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OCCUPANCY RIGHT

Gnauth Plauth Deb Law Research Thesis

OCCUPANCY RIGHT

ITS HISTORY AND INCIDENTS

**TOGETHER WITH AN INTRODUCTION DEALING WITH
LAND TENURE IN ANCIENT INDIA**

BY

RADHAROMON MOOKERJEE,

VAKIL, AUTHOR OF 'THE LAW OF BENAMI TRANSACTIONS.'



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To

The Hon'ble Justice Sir Asutosh Mookerjee, Kt., C.S.I.

**To whose noble enthusiasm, earnest endeavour,
and organising capacity, scientific research in
every department of knowledge owes so much.**

FOREWORD

This book is the outcome of the thesis approved by the Calcutta University for the 'Onauth Nauth Deb Law Research Prize.'

In the Introduction I have discussed in a general way the subject of *Land Tenure in ancient India*. In the portion of the book dealing with the Incidents of Occupancy Right, I have traversed practically *most of the important and relevant provisions of the Bengal Tenancy Act*, incorporated the *most recent leading cases* on the subject, and indicated their *basic principles* in a way which, I venture to think, has not been done in any of the annotated editions of the Act.

My thanks are due to Babu Pankajkumar Gupta, B.L., Pleader, Berhampore, for his kindly taking the trouble of preparing the Subject Index.

BERHAMPORE,

RADHAROMON MOOKERJEE.

June, 1919.

PREFACE

The subject of the present thesis is "*The origin and growth of the right of occupancy in agricultural land and the incidents thereof.*"

The subject naturally divides itself into two parts—I. The origin and growth of occupancy right, and II. Its incidents.

In building up my theory of the origin and growth of occupancy right, I have had the advantage of the writings of many learned authors who have made laborious and minute researches into the nature of the landed rights in this country. I have attached hereto a list, by no means exhaustive, of the authorities I have consulted and have stated fully in the footnotes the sources from which every particular information is derived. While I acknowledge to them my indebtedness for the informations they have furnished, I have, by my own independent research, collected materials from our ancient Sanskrit books, the authentic history of the country during the Mahomedan Period and from Government Reports and Minutes, and recorded my own personal observations thereon. My research has been conducted independently without advice from or collaboration with others.

The portions of the thesis which I claim to be original are indicated below.

It has been said by a high authority that the occupancy right is a *creation of Act X of 1859*. I have attempted to shew in this thesis that this is far from the truth. A careful perusal of our Sanskrit Sastras and also of the record of the Mahomedan rule would convince any one that the *proprietary right in the soil always belonged to the cultivator* and that the King was only entitled to a share of its produce and was never regarded as its proprietor. And as the proprietary right carries with it the right of possession, there can be little doubt that the cultivators in ancient times had also the *right to occupy* the land. The rise of a class of landlords between the King and the village community did not disturb those cultivators in their occupation of the land. In those days in a state of society when there was plenty of unoccupied land and population sparse, and the competition consequently was not amongst tenants for land, but amongst

landlords for raiyats, it gradually became the *custom not to evict these resident raiyats so long as they paid their rent*. From none of these could any rent be demanded except what was fair according to received ideas, or in other words, *customary rent*. Thus immunity from ejectment and enhancement—the two privileges implied in the right of occupancy—were possessed by the tenants from the most ancient times. Besides these, there was another class of tenants who were *residents of a neighbouring village*, where they could not obtain enough quantity of land to cultivate, and who sought in a different village to bring under cultivation the lands which the resident raiyats of that village were unable to cultivate. It was only when such persons came to ask for leave to occupy the land that the rent could be fixed with some advantage. But even in their case it had to be determined at a low rate. The reason was that not having their residence in the village those people were not so amenable to pressure, and, what was more, they could at any time abandon the land for which they had no particular attachment. They have been held by all authorities to have no specific rights and to be mere tenants-at-will. Though *theoretically* they were *liable to ejectment*, in practice, however, the competition then being for tenants rather than for lands, *no ejectment could actually take place*. Thus those tenants also enjoyed some sort of protection both from eviction as well as from rack-rent.

But with the establishment of British rule, however the old state of things entirely changed. With peace, good government and improvement of commerce there has arisen great demand for land, and *rent*, which was formerly settled by custom, has now come to be *fixed by competition*. The Permanent Settlement made no provisions for the protection of the raiyats, and the Revenue Sale Laws expressly gave powers to the auction-purchasers to *oust all but the resident raiyats*. And when we recollect the fact that nine-tenths of the revenue-paying estates were soon after sold for arrears of revenue, we can well imagine how extensively the raiyats were ousted from their holdings by the purchaser of estates when a demand for land arose. The *resident hereditary raiyats* were indeed by law entitled to protection, but even in their case, owing to the absence of any definite rule of law and the constant change of landlords, possessed of large powers of disturbing their *vested rights*, these often came to be *lost sight of*. Besides, the non-resident raiyats in the village, who were mere tenants-at-will and who had yet been long cultivating the same pieces of land which they improved

by their own labour, if not by their own capital, were, therefore, equitably entitled to some sort of protection.

Act X of 1859 came to afford to the raiyats the protection which they so sorely needed. It gave equal protection to both these classes of raiyats by enacting that *twelve year's continuous cultivation of the same piece* of land would confer on them the right of occupancy in that land and that they could no longer be evicted therefrom. This provision substantially restored the *khud kasht* raiyat to the former position which he had always enjoyed during the Hindu and the Moslem periods and from which he had considerably fallen. For probably in those days a raiyat who had cultivated the same holding for the space of twelve years was presumed to have given the pledges required by the community for protection against ouster. The Act further conferred rights of occupancy on a large class of raiyats who had previously been mere tenants-at-will. The rule became the Charter of the cultivating classes and it became the ambition of every tenant to retain possession of his fields for twelve years and thereby to gain the coveted status of occupancy tenant with protection against arbitrary eviction, rack-renting and hereditary rights. On the other hand, it became a common practice with the landlord to evict the tenant and then to reinstate him or to induce him to change the particular fields he held for others, before his twelve years were up. The B. T. Act, 1885, considerably enlarged the basis of the claim to the occupancy right in view of these practices by enacting that the tenant, on proving that he has held, *any land in the village for twelve years continuously*, attains the status of a "settled raiyat," and becomes, as such, entitled to an occupancy right in all the lands he holds for the time being.

With regard to the origin of the occupancy raiyat, or *khud kasht* raiyat as he is called, there are two different theories put forward. According to Dr. Field they were *outsiders*, who had been permitted to settle in the village and had to contribute to the Raja a share of the produce as government revenue and to the village community something in addition. According to Mr. Baden Powel, on the other hand, they were not settlers from outside but *original members* of the village community who cultivated their own lands and were liable for shares of the government revenue and nothing in addition. They were, in fact, proprietors of the soil, which they cultivated.

I have attempted to shew that both the above views contain only half truths. There can be no doubt that the *original settlers in the village*, who were all members of the same family, and who, in course of time, formed the village community, were the *proprietors of the village lands*, which they themselves cultivated. But the struggle for existence compelled them to *amalgamate with strangers*, who, although *originally had no right to the village lands*, would then *become as much proprietors* of the lands which they had themselves cleared and on which they had established themselves. But when the struggle for existence ceased to trouble the community it became a close corporation and *refused to assimilate the strangers*. As soon as this stage was reached there could be no doubt that any new-comer would only be *admitted into the village* on terms of paying rent for the use and occupation of lands, or, in other words, *as tenants* under the original proprietors and acquired no proprietary right in them themselves. With the rise however of a class of aristocracy intermediate between the King and the village community, who assumed the landlord's right over the *village proprietors* whom they degraded to the *position of tenants* under them, the distinction that had existed between the outsider and the proprietors themselves soon disappeared. All were now tenants under the landlords. Besides these, there were the non-resident raiyats of the village, already spoken of, who yet cultivated the village lands and have been held by all authorities to be mere tenants-at-will. Act X of 1859 gave all these different classes of tenants the right of occupancy without any distinction as to their origin. Thus all raiyats in the village—whether the original members of the village community, or the outsiders assimilated into it, or the outsiders not so assimilated but settled in the village as tenants, or the non-resident cultivators in the village,—could become occupancy raiyats after they had held the same land for twelve continuous years. And the B. T. Act of 1885 went further and provided that by only holding *any* land in the village for the same period such right *could be acquired*.

In dealing with the incidents of occupancy right, besides the authorities already referred to, I have to depend more largely on the reports, both government and private, of the decisions of the High Court interpreting the provisions of the laws relating to the same. I have tried to find out what may be called the leading cases on the subject and to deduce from them the underlying principles on which they are based and indicated them in my thesis in a way which, I venture to say, has not yet been done in any of the annotated editions of the Acts.

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INTRODUCTION

Land Tenure in Ancient India.

CHAPTER I.

THE HINDU PERIOD.

The subject of the present thesis is—“*The origin and growth of the right of occupancy in agricultural lands and the incidents thereof.*” Subject of thesis.

The subject, no doubt, is a very important one, not only from the point of view of a professional lawyer, but also from the higher standpoint of a student of the science of law. The University of Calcutta by fixing it as the subject of this thesis have shewn their genuine appreciation not only of purely scientific researches in the departments of Indian law, but also of the difficulties of a practising lawyer in dealing with cases involving the law on the subject. Its importance.

The subject naturally divides itself into two parts:— Its division.

I. The origin and growth of occupancy right.

II. Its incidents.

I shall first dwell upon the first part of the subject and then proceed to deal with the second.

By the expression “*occupancy right*” is meant the right of a raiyat to occupy the land comprised in his holding inspite of and against the wishes of his landlord to the contrary. Definition of occupancy right.

The origin and growth of the right of occupancy cannot be clearly understood without considering generally the history and development of land tenure in this country. Enquiry into history of land-tenure necessary.

The sources of our information as to land tenure during the Hindu period of Indian history are, however, very limited. The Hindu law books are singularly defective in respect of the rules relating to the tenure of land, and to the mutual rights of the various classes engaged in its cultivation. From the Code of *Manu*, for instance, we obtain little help. We find only casual mention of rights in land: the general theory of land right is not touched upon, but only some special cases thereof.¹ This peculiarity is Hindu Period.

¹ Phillip's *Law relating to the Land Tenures of Lower Bengal*, Tagore Law Lectures. 1874—75, 3-4.

Proper
method of
enquiry.

all the more striking, because the real wealth of the country is and has always been agricultural.¹ The question has to be answered in the silence of express law by a reference to the actual practices and the ideas of the time.² Besides, the researches into the archaic laws and customs of the different nations, which have been carried on by the western scholars with their accustomed vigour and success, have brought to light the existence of certain institutions amongst them in remote antiquity. And in the light of these discoveries we may approximately ascertain the state of the land law in India during ancient time. To a student who would confine his attention solely to the ancient Sanskrit documents of Hindu law and usage, much of the evidence they furnish will be lost or appear to be devoid of meaning. But if he makes a study of similar institutions in other countries and takes a broader and comparative view of the subject, many of the data which he might at first pass over as useless and unimportant will assume a new significance.

Different
theories as to
property in
land accord-
ing to ancient
Hindu Law.

King if
proprietor.

Views of
Mill.

Of Vincent
Smith.

The Hindu Codes of Law do not distinctly state to whom *the property in the soil belonged*. But two different and somewhat contradictory theories as to the ownership of the soil during the Hindu period have been put forward by western scholars. According to some ownership in the soil vested in the King, while according to others, in the subject who cultivated it. Thus Mill, the celebrated Historian of India, holds³ that according to the ancient lawgivers the *King had the absolute property in the soil*. He comes to this conclusion by analogy with the custom of some barbarian tribes recognising this principle, as stated in the writings of certain travellers, and by referring to certain passages in the Institutes of *Manu* where the King is called "*the lord paramount of the soil*"⁴ and where the occupier of land is held "responsible to the King if he fails to sow it."⁵ It is probably on the authority of Mill that a more modern historian of ancient India, Vincent Smith, dealing with the subject of land revenue during the reign of Chandra Gupta, the first Maurya Emperor of ancient India, has expressed the opinion that "*the native law of India has always recognised agricultural land as being crown property, and has admitted the undoubted right of the ruling power to levy a Crown*

¹ Maine's *Village Communities of East and West*, 51.

² See foot-note, Page 1.

³ Mill's '*History of British India*' Vol. I. 180.

⁴ *Manu Samhita*, Chapter VIII. 39. "बृहिरधिपतिर्हि सः."

⁵ *Ibid*, 243 :—"वेदिकस्थायी दण्डो भागाद्वयगुणो भवेत्।"

rent or 'land revenue,' amounting to a considerable proportion either of the gross produce or of its cash value."¹ And in his book on the Emperor Asoka, the Great, he has also re-iterated the above opinion without any adequate data in these words:—"An *agricultural land* was regarded as *crown property* and the normal theoretical share of the state was either one-fourth or one-sixth."² In the latest edition of his *History of India* he could cite as an authority in support of the view only a passage from a commentary on a text of the *Arth- Sastra of Kautilya* which runs thus:—"Those who are well versed in the *sastra* admit that the king is the owner of both land and water and that the people can exercise their right of ownership over all things excepting these two" Another modern authority in America³ Of Hopkins. collects evidences from the earliest Vedic age to the later days of the *Smritis*, on the basis of which he strongly supports the view that the *King* was recognised as the owner of all the land. He observes:—"It was unquestioned that the King was the master of all. The *King* is not only the over-lord, he is the owner and one of his Arguments in support thereof. old titles is—'The one owning all.' The King in the earliest period (in the recorded ceremony of inauguration) is expressly said to be the "*devourer of his people*." This is no isolated phrase nor are the people other than his own" (*vaisyas*). And he refers to a passage in the *Aitareya Brahmana* according to which the *Vaisya's* peculiar function is to be devoured by the priest and the king (VII 29-3). "It is non-sense"—he says—"to suppose a peasant proprietor openly described as fit only to be robbed by the king, could have any secure hold on his landed property. The king's ownership extended to all property except a priest's, which is especially described as the only land in his realm 'outside the king's district' (*ā cā*). We find the same view also in the legal literature. *Bṛihaspati* (500—600 A.D.) says that the reason why the king becomes heir to property left without another heir (male issue, wife or brother) is that he is the "*owner of all* ; " and

Vincent Smith's '*The Early History of India*' 1st Ed. 1904, 123.

Ibid, *Asoka*, Rulers of India Series, 2nd Ed. 96.

3rd Ed. (1914), 131 the original passage runs thus:—

"राजा भूमिपति ईष्टः शास्त्रज्ञैरुदकस्य च । ताभ्यामन्यसुयद्रव्यं तद खाद्यं कुटुम्बिनाम्"—Comment on *Artha Sastra*. BK. ii, Chap. 24. But

the original text on which it is the commentary has nothing to do with the question.

Hopkins '*India old and New*' 221 &c.

Narada, who wrote about the same time or a little earlier, says that the real estate held for three generations cannot be estranged except by the king's will. Again, *Brihaspati*, while discussing the question :—[to which man does a land taken from a village belonging to one and transferred to another man either by the action of a river or by the king, belong?] says :—“ It belongs to him who gets from river or from the king.” The king gets half the treasure-trove and when he gives a village to a priest, he gives him as owner the right to all the treasure-trove. The *Epic* also has many passages shewing that, while a priest claimed a divine right to possess everything in theory, he abrogated this in practice, and in consequence everything belongs to the king to give. ‘ Only a warrior (king) may give land to a priest’—it is said’ and conversely it is said again :—‘ Land may be taken possession of only by a king.’ ‘ It is a vedic utterance that, the king is the owner of the wealth of all save the priests, is another statement made alike by law and epic. Further more, although the epic kings are perpetually admonished by the sages not to do wrong to the people and although various sins against them are enumerated as possible, yet it is not once hinted that the king should not rob his subjects of land, as we might expect to meet if the land were regarded as originally the peasant's own, in the vast epic literature and the wide range of legal *sastra*. It is only till the 5th century A.D., that the king is admonished ‘ Not to upset the two foundations of the peasant's life, his house and his field ’ (*Narada's Law Book*) * * * Further the king is declared to be ‘ the preserver and destroyer ’ of his people who are still, as of old, to be ‘ devoured ’ by taxes or otherwise as the King sees fit, and when he needs it, ‘ the King may take all the possessions, small and great, of those who break the ten commandments (of morality) and possessions of any one save a priest ’ He gives and gambles away fields, villages, and whole districts at pleasure. Nor is such a gift of a village a presentation of a right to tax alone. As the recorded copper-plate grants of the first centuries shew, the grantee is made absolute owner, not relative as in the case of an overlord.” He further refers to the passage in the *M nava Dharma Sastra* which describes the King as the ‘ lord of all ’¹ a phrase which Bühler, another great

¹ *Manu Samhita*, Chapter VIII. 39.—

निधीनानु पुराणानां धातूनामिव च क्षितौ ।

अर्धभागश्चाद्राजा भूमिरधिपतिर्हि सः ॥

authority, is inclined to interpret as a proof of land-owning,¹ and on which Mill also bases his view, as we have already stated. Bühler also regards the rule as to King's right to make gift of a village to the priest as a distinct recognition of the principle that the ownership of all land is vested in the king².

The evidence however is quite inadequate to prove what is sought. The power of "*devouring the people*" to which reference has been made by Hopkins is undoubtedly a *political power*, and has no connection with the right of ownership. Hopkins thinks that the gift of land to priests, which seems to be the first sign of land transactions in the *Brakmanas*, was an *actual gift of land*. But the evidence on the point to which he draws our attention is inconclusive of the matter. It may have been so in many cases, but it may easily also have been explained as the grant of the *mere superiority apart from ownership in the soil*. And the epic grants on which he relies are hardly decisive one way or the other.³ With regard to the other evidence, the most important perhaps on which Hopkins so much relies, the authoritative interpretation of the text of the *Veda* on which it is based, does not lend any support to his theory. Thus the great *Jaimini* in his *Mimansa Darsana* discussing this question, distinctly lays down that the maxim of law that 'the king is lord of all, excepting sacerdotal wealth' concerns his authority for correction of the wicked and protection of the good. His kingly power is for government of the realm and extirpation of wrong; and for that purpose, he receives taxes from husbandmen, and levies fine from offenders. But *the right, of property is not vested in him*; else he would have property in the house and land appertaining to the subjects abiding in his dominions. The earth is not the king's but is common to all beings, enjoying the fruit of their own labour. It belongs, says *Jaimini*, to all alike."⁴ *Savara Sivami* commenting on this passage says:—"the king cannot make a gift of his kingdom for it is not his, as he is entitled only to a share of the produce

Orthodox
views of
king's right

of *Mimansa*.

Savara.

¹ In his note on *Manu* loc cit S. B. E. 25, 259.

² *Ibid*.

³ See Macdonell and Keith's '*Vedic Index of Names and subjects*.'

⁴ *Jaimini* 6.7, 2: "न भूमिः स्वात् सर्वान् प्रत्यविशिष्टत्वात्"—Colebrooke's *Miscellaneous Essays*, 345.

Sayana.

by reason of his affording protection to his subjects.”¹ And Sayana, the celebrated commentator of the Vedas, adds—“A king’s sovereignty lies only in his punishing the wicked and protecting the good.”² The records of Hindu thought from the earliest time down to the dawn of history are unanimous in this theory of the king’s right. With regard to the passages of *Manu* on which Mill as well as Hopkin’s rely, it may be pointed out that as the king is, elsewhere in the Code, described as “the regent of the waters and lord of the firmament,”³ the first passage, on which he bases his opinion, is not conclusive. Besides, it gives the reason why old hoards and minerals in the earth belong to the king, and has nothing whatever to do with the property in the soil. The second passage is intended for the protection of the share of the produce of the soil to which the king is, by law, entitled, on account of his revenue. The original text of *Kautilya* from the commentary on which the passage has been cited by Vincent Smith in the latest edition of his history of India has no reference to the question now in issue. Even *Kautilya*, the minister of Emperor Chandra Gupta Mourya, whose devotion to the task of empire-building compelled him to exalt the position and dignity of the Emperor, never claimed for him the ownership of the soil of his Empire. And in the passage referred to the commentator makes only a general reference to the *Sastras* without citing the particular texts on which he relies, and on the face of the *sastric* texts we have already cited his opinion as to what is laid down in the *sastras* cannot be accepted as authoritative on the matter.

King
entitled
only to share
of produce.

Rigveda.

An examination of the ancient sanskrit texts dealing with the king’s revenue clearly shews that he was never regarded as the proprietor of the soil. He was entitled only to a share of the produce of the land in the occupation of his subjects. Thus in the *Rigveda*, the most ancient record of the human race, this view of the king’s right which runs through all the later law books, is found. It is

¹ Savara’s Commentary on the above—“सर्वभूमिलेऽस्यले तदधिकं यत् असी प्रथिव्यां सन्भूतानां व्रीक्षादीनां रचनेन निर्व्विष्टस्य कस्यचित् भागस्य ईडे न भूमिः ।”

² Sayana’s Commentary on the above “दुष्टशिक्षा शिष्टपरिपालनाभ्यां राज्ञ ईशित्वं कृत्यभिप्रेतम् इति । न राज्ञोभूमिर्धनं, किन्तु तस्यां भूमौ स्वकार्यफलं भूक्षानां सर्वेषां प्राणिनां साधारणं धनं ॥”

³ *Manu Samhita*, Chapter VII, 7 :—“सर्वदण्यः स नृक्षेत्रे प्रभागतः ।”

there stated:—"May Indra ordain that your subjects may pay you tax (*Vali*)"¹. And the lexicographers are unanimous in stating that the word '*Vali*' is always used in the technical sense of the king's share of the produce. The *Upanishads* stand next in order of time to the *Vedas* and the *Brihad Aranyaka Upanishad*, explaining in a parable the relationship between the senses and the organs of action on one side, and the chief *Prana* (consciousness) on the other, goes on:—"The *Prana* then said to the senses that if they were convinced that he was the superior they must pay him *Vali*"². The expression used in the text is '*Vali*' which has been explained by *Sankaracharya* in his commentaries on the said *Upanishad* as meaning *kara* or tax; and we have already seen that the term is synonymous with the king's share. We have abundant evidence in *Dharma Sutras*, the class of works that came next into vogue, as to the king's right to a share of the produce. Thus *Gautama*, the earliest of the *Sutrakaras* says:—"The cultivator must pay to the king a tax amounting to one-tenth, one-eighth or one-sixth of the produce"³. *Baudhayana*, who is later than *Gautama*, says:—"Let the king protect his subjects receiving from them a sixth part" (of their incomes)⁴. The Aphorisms of *Apastamba*, another early *sutra* writer, contain the following text:—"He (the king) shall make them (his subordinates) collect the lawful taxes (*Sulka*)."⁵ The word *Sulka* is here used, which *Haradatta* in his commentary explains to mean a twentieth part of the merchant's gain. *Vasistha*, speaking of the king's right, agrees in the opinion of the other sages⁶. The later sages also are unanimous in this theory of the king's right. Thus *Manu* lays down:—" * * * of grain an eighth part, a sixth part or a twelfth part (may be taken by the king) according to the nature of the soil and the labour necessary

*Brihad
Aranyaka
Upanishad.*

*Dharma
Sutras.
Gautama.*

*Baudhayana,
Baudhayana.
Apastamba.*

Vasistha.

*Dharma
Sastras of
Manu.*

¹ *Rigveda*, VIII. 8. 173—"अथो त इन्द्रः केवलीर्विशोवलिहृतस्कारत्"

² *Brihad Aranyaka Upanishad*:—"तस्य मे वलिं कुरुतेति तथेति" which is thus explained:—तस्य मे श्रेष्ठस्य पूर्व्यं वलिं कुरुत करं प्रयच्छतेति"

³ *Gautama*, Chapter X. 24, *Sacred Books of the East*, Vol. II. 227—228.

⁴ *Baudhayana*, *Prasna* I, *Adhyaya* 10, *Kandica* 18, verse 1:—

"वङ्भागधत् राजा रक्षेत् प्रजाः"—Bühler. 192.

⁵ *Apastamba*, *Prasna* II, *Patala* 10, *Kanda* 26, verse 9, *Sacred Books of the East*, VII. 162.

⁶ *Vasistha*, Chapter XIX 26—27,

to cultivate it¹ or more in cases of distress²." Such is also the view expressed by *Yajnavalkya* in the verse noted below³. *Narada* defines '*Vali*' as a sixth of the produce of the soil and mentions it as an item of the king's revenue⁴. The *Vishnu Smriti* dealing with the king's revenue says :— "He must take from his subjects as tax a sixth part of every ear of the paddy"⁵. In the *Mahavarata* also a sixth portion of the produce of the land is mentioned as a source of the king's revenue⁶. Such is also the rule laid down *Kautilya* in his *Artha Sastra*⁷ and *Sukracharya* in his *Niti-sastra*⁸.

Implying
cultivator's
proprietary
right to soil.

From the above it is clearly shown that the only right which the king possesses over the land in the occupation of the subjects, is a *right to a share of its produce*, though the authorities are not unanimous as to the extent of this share, the opinion of the most of the text-writers being that it is one-sixth, while according to some an eighth, tenth, or even a twelfth, is considered as proper, and the utmost that the king could claim under any circumstances was one-fourth. Be that as it may, as the king's share is so limited, as stated above, to one-sixth, or at most to one-fourth, it may be fairly argued that there must have been another proprietor for the remaining five-sixths or three-fourths, who must obviously have had the greater interest of the two in the whole property shared⁹. This is the *cultivator of the soil*, who must accordingly be held to *its proprietor*.

¹ *Manu*, Chapter VII. 130 :— 'धान्यानामष्टमीभागः षष्ठो द्वादश एव वा ।'

² *Ibid* Chapter X. 120 :— 'धान्येऽष्टमं विंशं युक्तं विंशकार्षापणावरं ।'

Ibid, 118 :— 'चतुर्थमाददानि, पि चवित्थो भागमापदि । प्रजारचन् परं शक्ता किल्लिषात् प्रतिसुच्यते ।'

³ *Yajnuvalkya Samhita*, Bombay Edition, 99—पुण्यात् षड्भागमादत्ते न्वायिन परिपालयन् ।'

⁴ *Narada Smriti*, Chapter XVIII. 48 :— भूमिः षड्भागसङ्गितात्, वलि स'

⁵ *Vishnu Smriti*, Chapter III, 22 :— 'प्रजाभ्यो वक्ष्यर्थं संवत्सरस्य धान्यतः षष्ठमाद्यात् ।'

⁶ *Mahavarata, Santi Prava*, Chapter LXIX, Verse :—

“आददीत वलिचापि प्रजाभ्य कुरुनन्दन ।

स षड्भागमपि प्राश्नस्तानिवाभिगुहये ॥”

⁷ Book II, Chapter I.

⁸ Book IV, Chapter II 222—30.

⁹ *Elphinstone's History of India*, 9th Edition, 26.

The different sources of the revenue of the ancient Hindu King, as enumerated by the law-givers, such as *Gautama*¹, *Apastamba*², *Baudhayana*³, *Vasistha*⁴, *Manu*⁵, *Yajñavalkya*⁶, *Narada*⁷, and also in the *Mahavarata*⁸, shew that none of them have any connection with the property belonging to the king nor can they be identified with *rent* or fee for the use and occupation of another's property, and the fact that the taxes on the produce of the land and those on certain moveables are placed on the same footing, indicates that the demand of the king from the cultivator of the soil of the share of its produce does not stand on a higher footing than that, for instance, from a merchant upon goods sold, and that in each case the ownership over the taxable property is with the tax-payer and not with the king, who is entitled to the tax only.

Besides the above indications we have positive evidence to shew that the proprietorship in the soil always rested with the cultivator. According to the ancient Hindu law, as according to the ancient Roman law, land not brought under cultivation or not taken possession of with the object of appropriating it, is, like fishes of the rivers and seas, the fowls of the air, or the wild animals of the forest, *res nullius* (*aswamika* i.e. without owner). Thus in the *Usanas Samhita* we find it laid down that "forests and waste lands*** are said (by the sages) to be without owner."⁹ This ancient Hindu law of *res nullius* in respect of jungle land is repeated almost in the self-same words in the *Mahavarata*,¹⁰

Sources of king's revenue indicate the same.

Earth *res nullius* in ancient Hindu law.

¹ *Gautama*, Chapter X, verses 24-34 :—"राज्ञे बलिदानं कर्षणे दंशम मष्टमं वा"

² *Apastamba*, *Prasna* II. Patala 10, Kanda 26, verse 9.

³ *Baudhayana*, *Prasna* I, *Adyaya* 10, *Kandika* 18, verse 1.

⁴ *Vasistha*, Chapter XIX 26-27 :—

⁵ *Manu*, Chapter VIII, 307. They are :—(i) *Vali* (ii) *Kara* (iii) *Sulka* (iv) *Prativaga* (v) *Danda*. For their meanings see *Kulluka's* commentary.

⁶ *Yajñavalkya*, Bombay Ed., 98-99 already quoted.

⁷ *Narada*, Chapter XVIII.

⁸ *Mahavarata*, *Santi Parva*, Chapter LXIX, Verse 25 :—

"आददीत बलिंचापि प्रजास्य कुबलन्दन ।

स वडभागमपि प्राश्नानिवाभिगुप्तये ॥"

⁹ *Usanas Samhita*, Chapter V, 16 :—अटव्यः पर्वताः पुन्यतीर्थान्यायतनानि च सर्व्याणि अस्मानिवाणि आहुः ।

¹⁰ *Mahavarata*, *Anusasana Parva*, Chapter LXVI. 35 :—अटवीपर्वताश्च व नद्यतीर्थमयानि च सर्व्याणि अस्मानिवाणि आहुः ।

indicating that it was one of the universally recognised maxims of the law, never open to question, that unreclaimed jungle land was without any owner.

As well as *Res communes*.

But along with the idea that the earth was *res nullius* there runs through our sacred books a parallel idea that the earth was *res communes* or the common property of all men, just as air and water. In fact our *Rishis* made no distinction in principle between *res nullius* and *res communes*. Thus according to *Jaimini*—"The earth cannot be given away as it is the common property to all."¹ *Savara swami* commenting on the aphorism says:—"The earth is the common property of all human beings***none can be the owner of the whole earth"² and *Sayana* explaining the same passage says:—"The soil is the common property of all and they through their own efforts enjoy the fruits thereof."³ These passages are sufficient to shew that according to ancient Hindu Law the earth and all things therein were the general property of mankind from the immediate gift of the creator.

Ownership in particular portion thereof.

But though the sages thus regarded the earth to be the common property, they held that a *right to particular portion* of it might be acquired. This is by *appropriation*, that is to say, by taking possession of it with the intention of keeping it as one's own. And the first act which shews such an intention was undoubtedly the reclamation of the jungles. It naturally follows from the above that proprietorship originates with the act of reclamation, and the *peasant who reclaims and converts the jungle into arable land becomes thereby the proprietor of the same*. This is clearly stated by the great *Manu* in the following passage:—"Even as the wild deer of the forests become the property of the man who first pierces them with arrows, so does the arable land, they say, become the property of the man who first cuts down the jungle for purposes of cultivation."⁴ And the commentator *kulluka* in explaining the same says:—"The field is spoken of as the property of the man who

How acquired.

¹ Chapter VI. 7. 2.—'न भूमिः स्यात् सर्वान् प्रत्यविशिष्टत्वात्.'

² *Mimamsa Bhashya*, Chapter VI. 7. 2.—'जेवाणामीशितारो मनुष्या दृश्यन्ते न तु कृच्छस्य पृथिवी गोलस्य ।

³ *Nyaya Mala Vistara* 353.—'तस्यां भूमीं स्वकर्म्मफलं मुक्तानाम् सर्वेषाणां प्राणिनां साधारणं धर्मं, अतोऽसाधारणस्य भूखण्डस्य सत्यपि दाने मह्यभूमिदानं नास्ति । Also *Sayana Bhashya*.

⁴ *Manu Samhita*, Chapter IX. 44:—"स्यानुच्छेदस्य केदारमाहुः शल्यवतोच्चगम्" ।

removes the fixtures (jungle) and thereby converts the jungle into a field.”¹ It is clear therefore that our ancient law regarded the jungle and other unreclaimed waste lands in the same light as the fowl of the air, or the fish in the sea, or the wild animals of the forest, which any man might sieze and appropriate for himself. For acquiring proprietorship in such lands there was but one way open, and that was by reclamation. Whoever reclaimed any jungle land became its proprietor—himself and his heirs after him. And so far as proprietorship was concerned, the king stood on the same footing as his subjects. Like them he himself might also acquire the right of property in such lands by reclamation. So that they would be crown lands quite as much as they are in England. From the above it is clear that the cultivator was the proprietor of his own land that he cultivated. In the words the commentator *Sacara* :—“Men are the lords of their own fields.”²

If the cultivator himself, and not the king, is the proprietor of the cultivator's land, the question naturally arises—why is he to pay *rent* for it, be it a fixed share of the produce of the soil, to the king? The Anglo-Saxon freeman (*ceol*) had not to pay rent for his free-hold, the Swiss or the French peasant-proprietor had not to pay rent for his holding to the king. The Indian peasant-proprietor also, like his Swiss or French *confrere*, had not to pay, what we call *rent* for the land he holds to the king. That fixed share of the produce which he had to pay to the king was paid not for the use and occupation of the land which belonged to the king. In our ancient *Sastras* it was called the ‘*Vali*’ (बलि) or a voluntary offering, and the delivery of the king's share of the produce is described as the ‘*Validan*’ (बलिदान) or the voluntary gift of the ‘*Vali*’ to the king.” The king was called the ‘*Visampa i*’ (विशम्पति) or the protector of the ‘*Vis*’ (विश्व) or the people, and as such the *Vali* (बलि) was paid to him at first freely as a contribution for the performance of the onerous duties of his office. As pointed out by *Savara Swami*, while commenting on the text of *Jaimini's Mimamsa* already referred to:—“The king is entitled to a share of the produce *by reason*

¹ येनस्यालसुतपाण्यं चेतं कृतं तस्यैव तत्चेतं वदन्ति ।

² चेत्वाचामीशितारी मनुष्या इष्ट्यन्ते ननु कृतञ्चस्य इष्टिवी गोलस्य—*Mimansa Bhashya*, VI. 7. 2.

³ राशे बलिदानम् कर्षकेः दशमम् षष्टमम् षष्ठम् वा—*Vishnu Smriti*, Chapter X.

of his affording protection to his subjects.”¹ And in this he only sums up the views of the earlier sages. Thus *Boudhayana*, for instance, says that “the king gets the sixth share as he protects the subjects”². *Yajnuvalkya* repeats the same idea in the verses noted below³, and such is also the view expressed by *Parasara*⁴. *Narada* declares that the revenue which under the name of ‘share’ is derived by the king from land and other sources is ordained his remuneration for protecting his subjects (प्रजापालन वेतनम्).⁵ The *Mahavarata* also speaks of the royal share along with the other taxes as the wages (वेतनम्) realised for services rendered by the king⁶. There can be little doubt that what was originally given as a voluntary offering (दान) came by custom to be soon regarded as compulsory for the services rendered by the king, and ‘Vali’ (वलि) sometimes came to be identified with *kara* (कर) or tax, and sometimes used technically as the share due to the king (राज याच्यभागः). And *Jaimini* in his *Mimansa* distinctly states that the share of the produce received by the king from the cultivator of the soil is, as in modern terminology, a *tax* and not *rent*⁷ and this is also borne out by the texts already referred to.

From what is stated above it is clear that ownership, or Cultivator's such ownership as was within the conception of the time, was ^{ownership} with the community which existed before kings or sovereigns⁸. ^{in other countries.}

¹ *Savara's* Commentaries on *Jaimini* 6. 7. 2. :—सर्वभूमित्वं स्वले-
तदधिकं यत् असी पृथिव्यां सम्भूतानां ब्रह्मादीनां रक्षणेन निर्विघ्नस्य कस्यचित् भागस्य ।

² *Baudhayana*, *Prasna* I. Adhyaya 10. Kandika 15. Verse 1.
Bühlers Translation 192 :—“षड्भागश्चतो राजा रक्षेत् प्रजाः ।

³ *Yajnuvalkya*, Bombay Edition, 98—99:—अरक्षमानां कुर्वन्ति यत्किञ्चित्
किल्बिषं प्रजाः । तस्मात् नृपनेरहं यस्मादग्गृह्णात्यसौ करान् ॥ 335 पुण्यात्
षड्भागमादत्ते न्यायिन परिपालयन् । सर्वदानाधिकं यस्मात् प्रजानां परिपालनं ॥ 337

⁴ *Vrihat Parasara*—अदारुपदवं राजा तस्करादिसमुद्भवं । सं रक्षेत् सर्वतो
यज्ञात् यतो गृह्णात्यसौ करान् ।

⁵ *Narada Smriti*, Chapter XVII, 43 :—अप्रकारादुचितादभूमिः षड्भाग-
सङ्गितात् । वलि सः तस्य विहितप्रजापालनवेतनम् ।

⁶ *Mahavarata*, *Santi Parva*, Chapter XXI. 10 :—वलिषट्तेन युत्सुकेन दक्षे
नय पराधिगम् । तन्मनिनेन लिपसिथ वेतनेन धनगामनि ॥

⁷ *Jaimini Mimansa* 6—7, 2. See *Hopkin's India, old and new*
221, &c.

⁸ *Field's Landholding and the Relation of Landlord and Tenant*,
419; *Maines 'village communities'*, 122.

The Greek notices¹ in which it would be dangerous to put much trust vary in their statements. In part they speak of the rent being paid and declares only the king and no private persons could own land, while in part they refer to the taxation of land. The evidence, so far as it goes, of other Aryan peoples does not support the theory of the original kingly ownership. Such ownership did not exist as far as can be seen in Anglo-Saxon times,² nor in Homeric Greece,³ nor in Rome. And there are some English writers who hold that the property in the soil in ancient India vested in the cultivator and not in the king⁴.

The next point to be considered is whether the land belonged to individuals in *separate* ownership, or to a body of individuals or families, or to the community as a whole in *common*. In recent times archaic institution of property has been the subject of careful examination by the jurists of the Historical school. The chief of them—Sir Henry Maine—is of opinion that “the oldest discoverable forms of property in land were forms of *collective* property and separate property has grown out of collective property or ownership in common”⁵ Some authorities are of opinion that in India in ancient times all *land was held in common by the village communities*, as is still the case in many of its parts, and that this might perhaps have been the general rule, subject perhaps to the exception that some individuals might have possessed property by grants of land from the villagers, or of the king’s share of the produce by a royal grant from the king.⁶ This opinion finds an important support or corroboration from the actual observation of a foreigner who came to India in the reign of Alexander, the Great. In 325 B.C. Nearchus, the admiral of Alexander, while sailing down the Indus, observed that *families cultivated the soil in common*.⁷ The families mentioned here evidently refers to the *joint families* which formed the units of the larger group known as the *village-community*

Ownership was common in ancient times.

¹ See Diodorus ii. 40: Arrian’s *Indica* 11: Strabo, 703: Hopkin’s J. A. O. S., 13, 87, &c.

² English Historical Review, VIII 1—7.

³ Lang’s ‘Homer and His Age’ 236 &c.

⁴ Wilk’s ‘History of Mysore,’ Vol. I, Chapter V and Appendix, 23: Elphinstone’s ‘History of India,’ Cowell’s Ed. 23.

⁵ Maine’s *Village Communities in East and West*, 76—77, 61.

⁶ Elphinstone’s *History of India*, 9th Edition, 25. Monier William’s *Indian Wisdom*, 264.

⁷ Max Müller’s *India—What can it teach us?* 48, 207: also Elphinstone’s *History of India*, 9th Edition, 259-260.

spoken of above. But the casual observation of a foreigner, quite ignorant of the manners and customs of the people, can carry but little weight and we must seek for other better evidence.

Village communities. It has been said that the political unit or 'the social cell' in India has always been, and, inspite of repeated foreign conquests, is still the *village-community*¹. Conquests and revolutions seem to have swept over it without disturbance or without displacing it². To quote the classic description of Lord Metcalfe:—"They seem to last where nothing else lasts. Dynasty after dynasty tumbles down; revolution succeeds to revolution; Hindoo, Patan, Mogul, Mahratta, Sikh, English are all masters in their turn; but village-communities remain the same"³.

Not owners
in ancient
India.

But whatever the social and political significance of these village-communities might have been in India, they played *no part in the growth and development of the proprietary rights in the land* which, in the opinion of Sir Henry Maine and others of his school, it did in other countries. Even in so early a period as the *Vedic* age the village does not appear to have been a unit for legal purposes and it can hardly be said to have been a political unit. The *Vedic* literature tells us very little about the social economy of the village. There is *nothing to shew that the community as such held the land*. There is no trace in it of communal property in the sense of ownership by a community of any sort, nor is there any mention of communal cultivation. What little evidence there is indicates that *individual tenure* of land was known and *individual property* in land seems also to have been presumed. The precise nature of the ownership is of course not determined by the expression '*individual ownership*,' but in effect, though not in law, it presumably meant *tenure by a family rather than by an individual person*⁴. It is therefore not a matter of surprise to us that ancient law books—the *dharma sutras* and the *dharma sastras*, which come later than the *Vedas*, make no reference to these communities; nor that we do not find any of these works

Joint
families
owners.

¹ Max Müller's *India—What can it teach us?* 47.

² Maine's *Ancient Law*, 261.

³ Report of Select Committee of House of Commons on affairs of East India Company, dated August 16th, 1882, Appendix.

⁴ MacDonell & Keith's *Index of Vedic Names and subjects under urvara kshetra and Grama*: Jolly '*Recht Und Sitte*' 93: Hopkin's *Journal of the American Oriental Society*, 13, 78, 128: Baden Powell's *Indian Village Communities* and *Village Communities in India*: Zimmer *Altindisches Leben*, 236: Mrs. Rhys David's *Journal of the Royal Asiatic Society* (1901) 180.

recording as a fact that in India at any time the '*gramas*' or villages were the proprietors in common of the lands with which the people of the villages were connected. There is therefore no reason to believe that there was any communal idea or the idea of common or joint ownership of land current among the members of any village community. Of course one community had lands and land-marks distinct from those of others, but each family had rights in the land in its occupation well recognised and distinct from that of another.

But although we do not find in any passage in Sanskrit text-books any direct allusion to the village co-parcenary, we do find in them scattered texts which evidence the existence and continuance of the village system as an integral and most important element in the social and political organisation of the days of *Manu* and *Yajnavalkya*, for instance. Such an indication is furnished by the law as to dispute between two villages on the question of boundaries as promulgated by *Manu* and other law-givers.¹ There we find that each village is regarded as a *distinct and separate unit*, having well-defined limits or land-marks and boundaries, and a raised earth-work called '*Setu*' ran along the boundary lines between the lands respectively belonging to two villages. Reservoirs, drinking places, elongated tanks, water-courses, and temple of gods are constructed at the place where the boundaries meet.² Within each village there may have been *individual property* established or *property owned by joint families*; but at the same time we cannot but concede that each village was regarded as a unit holding its own land, disputing with another similar unit as to whether a particular plot of land fell within the ambit of the one or the other. In some respects also the natives of each village formed a unit in the eye of the law. Thus certain taxes had to be paid by them *collectively*, and if stolen property could be traced to a village all the inhabitant's bore the joint responsibility.³

But while within a particular village the *joint families were the owners of distinct plots of arable lands*, Village distinct and separate unit
Common ownership of grazing field

¹ *Manu*, Chapter VIII: *Yajnavalkya*, Chapter II: *Narada*, Chapter XIX: *Vrihaspati*.

² *Manu*, Chapter VIII, 248.

“तद्भागानुदधानानि वायु प्रजववादि च ।

सीमासन्निधु कार्य्याणि देवतायतनानि च ॥

³ Barnett's *Antiquities of India*, Chapter III. 105.

there is evidence in our ancient lawbooks of the common ownership by the entire village community of other lands. Thus each village had its *grazing ground* for the cattle of all its residents and cultivators. It was common property of the entire village and none of the villagers had the right to appropriate any part of it for purposes of cultivation. *Manu* has laid down that grazing grounds are the common property of the village, and the people encroaching upon them are liable to punishment;¹ and *Yajnavalkya* also lays down substantially the same rule.² This was so even as early as the *Vedic* age when it was called *khila* or *khilya*, as surrounding the plough land.³ The village land appears also to include adjoining *forest tracts* over which the entire village has a common right⁴. Besides these, there were the *water-course*, the *village temple*, and the village gods which were the communal properties of the entire village. And even with regard to the arable land occupied or cultivated by the villagers which was considered to be the separate property of the joint families, we find a trace of the communal right of the village in the rule that such lands *could not be alienated without the consent of the entire villagers*⁵. But these and similar rights which the village communities had can hardly be construed as showing that at any stage of their history the entire land occupied and cultivated by the villagers was considered to be *common* property.

Of forest.

Of water-course, temple and gods.

Village organised and self-acting Society.

The village-community is an *organised society*, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for government, for police, for the administration of justice, and for the apportionment of taxes and public duties⁶. It is a little republic having nearly everything that it wants within itself and almost independant of any foreign relations⁷. It is *self-acting* and includes in fact a nearly complete establishment of occupations and trades for

¹ *Manu*, Chapter VIII. 237.

² *Yajnavalkya*, Chapter II. 169. "यानेच्छया गो प्रचारो भूमि राजवशेन वा"

³ See Pischel *Vedische Studien* 2, 204—207.

⁴ *Manu*, Chapter VIII. 260.

⁵ Anonymous Text quoted in *Mitakshara*, Chapter I, Section 1, Para 31:—

“स्वयम् अतिसामन् दायदातुमतेत च ।
द्विरष्टीदकदानेन षड्भिरगच्छति नैदिनो”

⁶ *Maine's Ancient Law*, 262.

⁷ Lord Metcalfe's Description, (see foot-note 3, Page 13).

enabling it to continue its collective life without assistance from any person or body external to itself. It has its headman or council of elders exercising quasi-judicial, quasi-legislative power, a village police, and several families of hereditary traders—the black-smith, the harness-maker, the shoe-maker, the potter, the barber and so on. The Brahmin also is found for the performance of ceremonies, and even the dancing girl for attendance at festivities. There is invariably a village accountant who keeps a record of the village produce showing particulars as to its distribution. But the person exercising these hereditary employments is really a *servant of the community as well as one of its component members*. He is generally paid by the allotment to his family of a piece of cultivated land in hereditary possession. The demands of those who produce wares are limited by a customary standard of price¹. The village-community in its social and economic aspects is but an *aggregation of families each of which has its private domain which it cultivates* for its own special benefit, and the chief sign of the collective ownership of the community that is found is the *waste land* which is held in common by the various families. It has the double aspect of families united by the assumption of common kinship and of a company of persons exercising joint-ownership over land. As an assemblage of families, it is an *organised society of joint families*; as a community of co-owners, it is an *assemblage of co-proprietors*. But the proprietor is the family, not the community or the individual.

Aggregation
of joint
families.

Thus whatever might be the state of things in other countries, in India the *joint family*, or the family joint in food, worship and estate, has always been the unit of society from the dawn of its history down to our own days. The Aryan people moved in families colonised as well as conquered the country². And even so early as the Vedic Age it is the joint families that we meet with as the unit of the Aryan society of the time³. Each of these families had its own piece or pieces of land for homestead and cultivation; and the family was the owner thereof. The common grazing ground, the common water-course, the village temple, and the village gods were communal property in which the families were

Joint family
owner.

¹ Maine's *Village Communities in East and West*, 125—126.

² Maine's *Village Communities in East and West*, 75; Campbell's *Cobden Club Essay*, 161; Fifth Report of Select Committee of House of Commons on affairs of E. I. Co., Vol. II, 678; Evidence of Fortescue before Select Committee of House of Lords (1830), 689.

³ Bhattacharjee's *Law relating joint Hindu family*.—Tagore Law Lectures, (1884—5) 79—80.

interested in common, but beyond these there seems to have been no unity of proprietorship. Each family cultivated its own lands, as it had done for years, nay for centuries, and, under certain circumstances, the interest which they had in the land was transferable. The family could sublet the land or get it cultivated by hired labourers. There were restrictions, no doubt, but those imposed were not of a character that would indicate any detraction from proprietary right. The restrictions were for the convenience of the neighbouring holders of land or other members of the community. They were in the nature of the right of pre-emption¹.

Expanded
into village
community.

The joint family is a corporate body of which the members are individuals. The village community is a corporate body of which the members are families.² The co-sharers in many of these village communities are persons who are *actually descended from a common ancestor*. That the village is primarily an association of kinsmen united by family-tie is apparent from the history of the Aryan conquest of the country. That race moved in families and colonised as well as conquered the country, and the joint family with its development gradually formed a village. According to the law governing the joint family, the son is a *co-owner* of the family property with his father. As soon as a son is born he acquires a vested interest in the family property, and on attaining the years of discretion he is, even in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. Though divisible theoretically, as a matter of fact, however, division rarely takes place even at the death of the father, and many generations constantly succeed each other without a partition taking place, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. Thus the *family in India has a perpetual tendency to expand into the village-community*.³ It is evident that an actual community of descent must depend upon mere accident. If a family settled on an unoccupied district, it might spread out till it formed one or several village communities. The same result might happen if a family became sufficiently powerful to turn out its neighbours or reduce them to submission.⁴

¹ Mitra's Tagore Law Lecture's on 'The Land Law of Bengal.' 16.

² Mayne's *Hindu Law and Usage*, Chapter VII, Section 196.

³ Maine's *Ancient Law*, 228, 261—262: *Early History of Institutions*, 106.

⁴ Mayne's *Hindu Law and Usage*, Chapter VII, Section 199.

But although the community might be founded by a single assemblage of blood-relations, men of *alien* extraction have always, from time to time, been *engrafted* on it. Struggle for existence with man, savage enemies and nature forced the amalgamation of strangers with the village group and united them in the same brother-hood. And, though the strangers were thus admitted into the brother-hoods, yet in all of them either the *tradition* is preserved, or the assumption is made, of *an original common parentage*.¹ Thus in many cases the members of the community profess a common descent for which there is probably no foundation, and in some cases it is quite certain there can be no common descent as they are of different castes or even of different religions. But it is a well-known fact that in India the mere association produces a belief in a common origin unless there were circumstances which make such an identity plainly impossible.² Thus the village-community is not necessarily an assemblage of blood-relations, but *either* such an assemblage or a body of co-proprietors formed on the model of an association of kinsmen.³

Introduction of strangers into community.

Tradition of common descent.

It was the struggle for existence that first led the Aryan group to submit to an *amalgamation of the strangers with the brother-hood*. When a stranger would first come in he would be looked upon by the community with a jealous eye as an interloper. But the struggle for existence would compel them to seek for his help and that jealousy would gradually fade. Besides they had more lands at the time at their command than they could themselves cultivate and they naturally allowed strangers to cultivate them. But while the land was plenty and many villages in progress, no man would undertake to clear a spot unless he was to enjoy it for ever. And when these immigrants offered unmistakable proof of *settling as permanent inhabitants* in the village, building clearing and establishing themselves as members of the village-community and ready to undertake a share in the responsibility attaching to that position,⁴ the distinction between them and the original settlers would gradually grow indistinct, and they would be *absorbed* into them. But so long as the assimilation did not take place or owing to change of circumstances could not, these immigrants would only be

Assimilation of strangers into village group.

¹ Maine's *Ancient Law*, 262—263.

² Mayne's *Hindu Law and Usage*, Chapter VII. Section 199.

³ Maine's *Ancient Law*, 264.

⁴ Maine's *Village-Communities in East and West*, 125—126.

Campbell's *Cobden Club Essay*, 165: *Directions for Revenue Officers*, 65.

reckoned as mere cultivators. *Intention to settle* in the village was no doubt the criterion to admit stranger into the community, and that intention in a primitive age had to be gathered from some length of possession. Accordingly those who had settled in the village *for more than one generation* were generally considered to have shewn that intention.¹ Thus the immigrants, when they became *permanent settlers*, were absorbed into the community but when they were mere sojourners they were not assimilated into the village group.

Origin of
tenancy.

If it was the urgency of the struggle for existence that forced the community to receive strangers into the brotherhood, there can be little doubt that, when with the establishment of settled government or from other causes, the struggle for existence ceases to trouble it, the community would refuse to receive the alien population within its pale. As Sir Henry Maine points out:—"During the primitive struggle for existence the communities were expansive and elastic bodies and these properties may be perpetuated in them for any time by bad government. But tolerably good government takes away from them their absorptive power by its indirect effects,"² and the village communities then become close corporations. As soon as this point is reached there is no doubt that any *new-comers* would only be admitted on terms of *paying rent for the use and occupation of land*.³ Besides, when the original settlers were numerous and their descendants increased in numbers sufficient to cultivate all their culturable lands, the cultivators would naturally be found to be proprietors. But when the land of the village was too extensive to be cultivated by the first settlers or their descendants, strangers would be introduced as *tenants*; ⁴ for the original settlers finding that they had more good land than they themselves could cultivate would endeavour to make a profit out of it through the labours of others. No method seemed easier than to assign it to a person who should engage to pay the Government's proportion with an additional share to the community. But while land was plenty, and many villages in progress, no man would undertake to clear a spot unless he was to enjoy it for ever; and hence *permanent tenants* would arise.⁵ When there was plenty of unoccupied land, and population sparse, the *competitio* was

Permanent
and
temporary
tenants.

¹ Rawlinson's *Land Revenue*, 15, 41.

² Maine's *Village-Communities of East and West*, 168.

³ *Ibid*, 179.

⁴ Field's *Introduction to the Regulations of the Bengal Code*, 31
Ibid Land-holding and relation of Landlord and Tenant.

⁵ Elphinstone's *History of India*, 9th Edition, 75 and *Ibid*.

not amongst tenants for lands, but amongst the proprietors for *rai-yats*. Tenants once induced to settle in the village were thus fostered; and when the son was able to step into the father's place, the arrangement suited both parties too well for any doubt to be raised as to the course to be pursued on the death of a tenant. When a share of the common rights passed into the hands of females or of persons whose caste prevented them from personally performing the manual labour of cultivation, a similar practice would be adopted as to land already brought under tillage which would thus be made over to some one who would undertake to cultivate it, to discharge the Government dues, and to give a share of the produce to those on whose behalf he cultivated. *Temporary* tenants would thus be created. But such tenants would only be available from the adjoining village where there was no land available to them for cultivation. They were thus residents of another or neighbouring village, who could not obtain in their own village as much land as they were able to cultivate.¹

These tenants, though at first strangers to the brotherhood, would be absorbed into the community when they once for all settled in the village, but so long as they were mere sojourners they were not assimilated into the village group. As Sir George Campbell points out:—"a distinction was made between *rai-yats* who had settled as *permanent inhabitants* of the village and had given pledges by building and clearing and establishing themselves and accepting a share of the common obligations, and the *temporary sojourners* or cultivators from another village."² The former had all the rights and privileges of the community extended to them on condition of their cultivating the land held by them and paying rent due on account of the same. It was the *residence in the village* that gave them the status of the member of the village community with all his rights and liabilities.

Former assimilated into community, latter were not.

Residence in village gave them status

We have already seen that although the village community was primarily an association of kindred, strangers were always engrafted on it. In the course of amalgamation of the strangers with the brotherhood, the community came to be divided into *several parallel social strata*. There are, first, a certain number of families who are traditionally said to be descended from the founder of the village. Below

Division of community into several parallel strata according to order of assimilation

¹ Field's *Introduction to the Regulations*, 31-33.

² Campbell's *Cobden Club Essay*, 165.

Their
relation with
each other.

them, there are others, distributed into well ascertained groups. The brotherhood, in fact, forms a sort of hierarchy, the degrees of which are determined by the order in which the various sets of families were amalgamated with the community. The tradition is clear enough as to the succession of the groups and is probably the representation of a fact. The length of the intervals of time between each successive amalgamation is also sometimes given which is always enormous. The superiority of each group in the hierarchy to those below it bears undoubtedly some *analogy to the superiority of ownership in the land* which all alike cultivate. And, to translate the relations of these component sections to one another into proprietary relations has been a perplexing problem to Anglo-Indian administrators. It is in the highest degree improbable that the various layers of the little society were connected with anything like the systematic *payment of rent*. It was the urgency of the struggle for existence that forced groups of men to submit to that amalgamation of strangers with the brotherhood which seems at first to be forbidden by its very constitution. The utmost available supply of human labour at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and it is the extreme value of the new labour which condones the foreign origin of the new hands which bring it. No doubt there comes a time when this process ceases, when the fictions which conceal it seem to die out, and when the village-community becomes a close corporation. As soon as this point is reached there is no doubt that any new-comer would only be admitted on terms of paying money or rendering service for the use and occupation of land¹ that is to say, *as tenants*.

Rights of
permanent
tenants.

There can be little doubt that the rights of these tenants were originally very uncertain and indefinite. But in course of time they came to acquire certain positive and definite rights by custom—the custom of many centuries and having at least as much force as any written law. For in the stage of society and of the ideas in which they grew up, custom was the main law: no doubt it was a law without the definite sanction of law, as in a more advanced state, but it was binding and effective notwithstanding. A right by custom, although in one sense only a moral claim, until clearly recognised by express law, would nevertheless be equivalent to a legal right. *Hereditary rights of occupancy* have been claimed for them; while, on the other hand, it has been con-

¹ Maine's *Village-Community in East and West*, 176—179.

tended that they have no rights whatever and could be ousted at the will of those whose lands they cultivated. The true state of things, as pointed out by Dr. Field, seems to be this — “When there was plenty of unoccupied land and population sparse, the competition was not amongst tenants for lands, but amongst proprietors for tenants. Tenants once induced to settle in the village were fostered, and where the son was able to step into the father’s place, the arrangement suited both parties too well for any doubt to be raised as to the course to be pursued upon the death of a tenant. Non-fulfilment of the conditions on which the land was cultivated, non-discharge of the King’s share of the produce, or non-delivery of the proprietor’s share of the same, rendered it necessary to remove a tenant. And in a state of society in which new tenants did not often present themselves, the *practical exercise of the power of ousting these tenants*, if it were possessed by the proprietor, was *not frequent*. Thus, notwithstanding occasional instances of ouster, it gradually became usual, in the language of a later stage of development, not to evict these raiyats so long as they paid their rent.¹ Protection from eviction

“The problem of Indian rent” writes Sir Henry Maine— “cannot be doubted to be of great intricacy. To see this, it need only be stated that the question is not one as to custom in the true sense of the word ; the fund out of which rent comes has not hitherto existed, and hence it has not been asserted on either side of the dispute that rent (as distinct from Government revenue) was paid for the use or occupation of land, before the establishment of the British Empire, or that if it was paid, it bore any relation to the competition value of cultivable soil,” and he asks the question—“what vestiges remain of ancient ideas as to the circumstances under which the highest obtainable rent should be demanded for the use of land?” and answers by quoting ‘*Leuchus Mor.*’ 159 as containing the most distinct ancient rule, according to which “the three rents are *rack-rent* from a person of a strange tribe, a *fair rent* from one of the tribe, and the *stipulated rent* which is paid equally by the tribe and the strange tribe.” Thus from none of the members of the village community (apart from express agreement) could any rent be required, but a rent fair according to received ideas, or in other words, a *customary rent*. It was only when a person, totally unconnected with the class by any of those fictions explaining its miscellaneous composition, which are doubtless adopted by all primitive groups, came asking for leave to occupy land, that the best Ancient theory of rent.

¹ Field’s Introduction 31—30 : Do. Landholding, 424.

bargain could be made with him to which he could be got to submit.”¹ Thus there were (a) *contract* rent which would apply equally to the same as well as a stranger tribe; (b) *customary* rent applying to one of the same tribe; (c) *competition* rent or *rack* rent for one of different tribe.

Rent paid by
them.

Applying this principle to the ancient village community of India we have contract rent both for the permanent and non-permanent tenants, customary rent for the permanent tenants alone, and competition rent for the temporary tenants only. Thus from none of the permanent tenants could any rent be required, but a rent fair according to received ideas, or in other words a *customary rent*² which could not be raised, [but which was higher than the rate of the other class of cultivators,³] in consequence of there being want of competition for land,⁴ but merely competition for cultivators. And besides, being bound to keep up cultivation to the full extent, they were bound to cultivate in the customary way⁵.

Right of
transfer.

Some authorities are of opinion that their holdings however were not *transferable*. Thus Mr. Shore says:—“On the whole I do not think raiyats can claim any right of alienating the lands rented by them by sale or other modes of transfer”⁶. And both Harington⁷ and Sir George Campbell⁸ agree in this. This was because *transferability* was not an incident of *proprietary right* in those ancient times. This must have been the case in very early times. For we find in the Buddhist period or at least as early as the reign of Emperor Chandra Gupta, that lands were as easily saleable as moveable properties. And the only restriction was that the tax-paying cultivator could mortgage or sell their lands *only among themselves*. So persons who enjoyed revenue-free lands could mortgage or sell such lands only to those who deserved, or were already endowed with, such lands. It does not appear that any violation of this rule invalidated the sale or transfer actually held-for the only penalty provided was that “otherwise the sellers were only liable

¹ Maine's *Village-Communities*, 180.

² Maine's *Village-Communities*, 187.

³ Campbell's *Cobden Club Essay*, 157 : 5th Report, Vol. I, 14.

⁴ Ibid, 164 : *Directions for Revenue officers*, 41. The Great Rent case,—B. L. R. Sup pp. 253, 279, 295, 296.

⁵ Fifth Report Vol. I, 164 : *Directions for Revenue officers*, 274.

⁶ Extracts from Harington's Analysis, 131, 5th Report, Vol. I 164 &

⁷ Harington's *Analysis*, Vol. III, 460 : Thomsan's *Selections*, 478

⁸ Campbell's *Cobden Club Essay*, 170, 171.

to a fine." In case of sales lands were put up to auction publicly in the presence of forty persons who owned properties in the vicinity. The auction was held by an officer of the King (called प्रति क्रोष्ट), and the purchaser had to deposit the sale price and a *toll* on the purchase-money with the King's Treasury¹. It must, however, be borne in mind that land being owned by joint families, their heads only, acting on behalf, and in the interest of, the families could sell.

Their holdings were also *heritable*.

Heritability.

The rights of the other class of tenants or those who were mere sojourners in the village or cultivated lands there while living in neighbouring villages, were of an uncertain and precarious description, which were left to be settled by *contract* and were hardly allowed to come under the higher protection of custom². They were mere *tenants-at-will* or more usually from year to year, but sometimes for fixed periods³. But they *could not be ousted* between sowing and harvesting⁴. They had to be attracted by favourable terms. And not having their habitations in the village, they were not so amenable to pressure, and could at any time abandon the land for which they had no particular attachment. They therefore generally made more favourable terms and paid lower rates than the permanent tenants⁵. In course of time as the competition for land increased, these raiyats had to pay generally higher rates than the resident raiyats⁶. But though their interest was uncertain and precarious they could obtain a permanent interest in the soil by *settling* as permanent inhabitants in the village, and establishing themselves as members of the village community ready to undertake their shares in the responsibilities attaching to that position. The disposition to become permanent settlers could hardly be satisfactorily proved without some length of *possession*. Accordingly those who had settled in the village for more than one generation were generally considered to have sufficiently shewed such inten-

Rights of temporary tenants.

Protection from Eviction.

Rent paid by them.

¹ Kautilya's Arthashastra, Book III. Chapter IX:—ज्ञाति सामन्त-धनिकाः कृषिण भूमिं परियहन् क्रतुमभ्याभवेयुः विक्रयं प्रतिक्रोष्टा शुल्कं दद्यात्"

² Phillip's Land Tenure, 23.

³ Ibid, " 22.

⁴ Land Tenure by a Civilian, 82.

⁵ Field's Introduction to Regulations, 33. Ibid, Land holding, 425.

⁶ Finucane and Amir Ali's Introduction to Bengal Tenancy Act, 1st Ed. 4.

tion, and such settlers became then recognised as *settled raiyats* of the village ¹.

Subletting
originally
unknown.

It seems that *subletting* was originally unknown. The early Aryan conquerors of India were an agricultural and not a pastoral race. They called themselves *Aryas*, meaning cultivators, as distinguished from the aborigines of the soil and took pride in the art of cultivation in which they excelled. The hymns of the *Rig Veda* sing many songs in praise of this occupation. It was not a disgrace then to hold the plough. But this state of things could not last long. Either from necessity, or from indolence, or an abundance of *Sudra* labourers, sub-letting soon became common. The primitive state of society which gave the first occupier a right to continue in occupation and no more, could not possibly last long. Complications must arise and did in fact arise, and Hindu sages had to grapple with the relations which the more developed state of things required them to deal with. Even in so early a period as the days of *Apastamba* we find that the lands were leased as in the present time ². And although *Mann* and *Yajñavalkya* do not deal with the matter as we expect them, *Parasara* ³ and *Narada* ⁴ deal copiously with the questions arising out of the relationship between landlord and tenant. *Kautilya* in his *Artha Sastra* lays down that in the case of a land-owner unable to cultivate his lands another might do so on a five years lease at the expiry of which he had to surrender the lands after obtaining a compensation for his improvements on the same.

Tenure held
by joint
families.

There can be little doubt that tenures in primitive times were tenures *held in common* by a group of kinsmen with the eldest male member of the family at the head. This was the joint family which then formed, as it does now, the unit of the Hindu society. The Hindu race moved in families colonised as well as conquered the country. The immigrants when they came into the village came with their families, the heads of which obtained leases of lands which they cultivated and on a portion of which they built their houses and settled with their families.

See *Ante*.

Apastamba II. 11, 28.

Narada, Chapter XI.

Book III. Chapter X:— “अनादियमज्ञपतोऽन्यः पञ्चवर्षाण्युपभुञ्ज्य
प्रयासनिश्चयेन दद्यात् ।”

As a general rule, the great field (of the village) was divided into plots corresponding in number to that of the heads of the houses in the villages; and each family took the produce of its share. It is a fair conclusion from the evidence that the system of *separate holdings* already existed in early Vedic times ¹. But the holdings belonged not to individuals but to the joint families, as we have already stated. Very often a family on the death of a house-holder would go on as before under the superintendence of the eldest son. If the property were divided, the land was equally divided among the sons.

In separate ownership

The fields were all cultivated at the sametime, the *irrigation channel* being laid by the community, and the supply of water regulated by rule, under the supervision of the headman. No individual or corporate proprietor needed to fence his portion of the field. There was *common fence*; and the whole field was surrounded with its rows of boundaries which were also the water channels.

Common ownership of Irrigation Channel.

And each village had *grazing ground* for the cattle in common, no one having separate pasture, and a considerable stretch of *jungle* where the villagers had common rights of waste and wood ¹. *Manu* has laid down that grazing grounds are the common property of the village and the people encroaching upon them are liable to punishment ². *Yajñavalkya* also lays down the same rule ³ And *Usanas* in enumerating properties not to be divided even among person of the same *gotra* makes mention of the 'field' ⁴.

Of Grazing field

Cultivation of land was in those early days very strongly insisted on and the sages ordain an obligation on the part of the holders of the lands to cultivate the soil and prescribes penalties for non-cultivation. Thus *Manu* says:—"If land be injured by the fault of the farmer himself, as if he fails to sow it in due time, he shall be fined ten times as much as the king's share of the crop, that might otherwise have been raised, but only five times as much if it

Obligation to cultivate.

¹ Macdonell and Koith's *Vedic Index of Names and Subjects* and *kshetra* and *urvara*: Rhys David's *Buddhist India*, 45—47.

² *Manu*, Chapter VIII.

³ *Yajñavalkya* Bom Ed.

⁴ Quoted in *Mitakshara* Chap. I, Sec. 4, Para. 26:—

“अविभाजं सगोत्राणाम-सहस्रकुलादपि ।

यार्ज्यं चेवच पचच कृतान्न मुदकस्त्रियः ॥”

was the fault of his servants without his knowledge" ¹. We find *Apostamba* laying down that if a lessee of land does not exert himself, and the land bears no crop in consequence, he is bound to pay the value of the crop that ought to have been grown on the land leased ². *Vyasa* says:—"If a man after taking a field with the object of cultivating it fails to do so, either himself or through the agency of others, he should be made to pay to the owner a proportionate share of the corn which the field could have yielded if it were cultivated and, in addition, a fine to the King ³. To the same effect is the injunction of *yajñavalkya* as will appear from the *Sloka* quoted below ⁴. And when a field is abandoned by its owner and the same is cultivated by another without opposition, the cultivator is entitled to the whole of the produce and the owner would not get back the land without paying the cost of clearance and cultivation. This is the rule laid down by *Narada* ⁵. The *Artha Sastra* of *Kautilya* contains the rule that in the case of a landowner unable to cultivate his lands, another might to do so on a five years lease. But an absentee landlord who was obliged to sojourn abroad for a time did not forfeit his land though it remained uncultivated. ⁶

Mutual relations between village community and families. It is not easy to determine the *mutual relations of the village-community and its component parts—the several families—with regard to land*. But sufficient evidence exists for the presumption that the village-community had

¹ *Manu*, Chap. VIII. 243 :—

“चेत्तिकस्याख्ये दण्डीभागाद्दशगुणो भवेत् ।
त तोऽई दण्डीभत्यानामज्ञानात् चेत्तिकस्य तु ॥”

² *Apartamba* II. 11. 28 &c

³ *Vyasa* quoted in *Vivada Ratnakur* :—

चेदं गृहीत्वा यः कश्चित् न कुर्वति न च कारयेत् ।
स्वामिने तत् फलं दाप्यो राज्ञे दण्डश्च तत्समम् ॥

⁴ *Yajñavalkya*, Bom. Ed. 218 :—

फालाहतमपि चेदं यो न कुर्यात् न कारयेत् ।
स प्रदाप्येऽङ्गदफलं चेद मन्येन कारयेत् ॥

⁵ *Narada*, Chap. XL 24 :—विज्ञप्यस्मिन् क्षेत्रे क्षेत्रे क्षेत्रिकः पुनराव्रजत्
खिलोपचारं तत्सर्वं दत्त्वा । चेदमाप्नुयात् ॥

⁶ Book II, Chapter X.

a large degree of control as to the occupation and cultivation of the village lands. Sir Henry Maine points out:—"Each family had the duty of submitting to the common rules of cultivation and pasturage, and of abstaining from sale or alienation without the consent of the co-villagers, and (according to some authorities) of refraining from imposing a rack-rent upon the members of the brotherhood."¹ Referring to the authority of Laveleye we find that the village-communities of all countries were averse to the alienation of land to strangers. "No one"—he says—"could sell the property to a stranger without the consent of his associates, who always had a *right of pre-emption*"². This rule has its prototype in the records of our ancient law. Thus the *Mitakshara*³ quotes an anonymous text which lays down that the consent of the village is necessary for the alienation—sale or mortgage. This appears also from the other texts quoted below⁴. *Kautilya* in his *Artha Sastra* lays down that the tax-paying cultivator could mortgage or sell their lands *only among themselves*, otherwise the seller was liable to a fine⁵. The members of the community thus had a sort of right of pre-emption, so as to keep the land within their own body. But these and similar customary rights which the village communities had can hardly be construed as showing that the entire land occupied or cultivated by the villagers was considered to be common property⁶. But there was no such proprietary right against the community as we are accustomed to.

Each of the villages was under its own head-man, who is referred to in the *Rig Veda* and often in the *Smritis* and the *Brahmanas* as the '*Gramani*' or the leader of the village.⁷

¹ Maine's '*Early History and Institutions*' 82.

² Laveleye's '*Primitive Property*', 118.

³ *Mitakshara*, Chapter I, Section 1. 31.

“सयामश्नति-सामन्तदायादानुमतेन च ।
हिरण्योदकदानेन षड्भिगच्छति मेदिनी ॥”

⁴ *Vrihaspati* cited in *Mitakshara*, Chapter I, Section 1, 30 :
Usanas cited in Do. Chapter I, Section 4, 26.

“यत्तुश्नसो वेत्तस्य अविभाज्यत्वमुक्तं ।

⁵ Book III. Chapter X :—See *Ante*

⁶ Sarada Mitra's Tagore Law Lectures on '*The Land Law of Bengal*', 18.

⁷ MacDonell and Keith's '*Vedic Index of Names and Subjects*' under '*Gramani*.'

Elphinstone is quite right in thinking that he is referred to in Manu as the '*Gramadhipati*' or the lord or superintendent of the village ¹. Originally he derived his right to the office *through his descent* from the founder of the village ². Rhys Davids ³ thinks that he was at first *elected* by the village council or a hereditary officer, and the appointment is only claimed for the king in later authorities. ⁴ But there is not even so much authority for election or heredity. The post may have been some times hereditary and sometimes nominated or elective ⁵. But considering the strong tendency of all Hindu offices to become hereditary, the office of the headman had probably acquired a *hereditary* element in very early times ⁶.

Presumably there must have been many '*gramanis*' or His functions '*gramadhipatis*' in a kingdom, and in considering their functions we shall arrive at some understanding of the revenue system of the Hindu Government, and of the mutual relation between the king and the community. The exact meaning of the title is not certain. By Zimmer the '*gramani*' is regarded as having had military functions only ⁷ and he is certainly connected with the '*senani*' or the leader of an army. But there is no reason to restrict the sense. Presumably he was the head of the village both for civil purposes and for military operations ⁸. But his most important duties were to adjust the revenue of the village and to collect it for the king or the State, and thus he combined the functions of the head of the community with those of an officer or representative of the government ⁹. He arranged all the details of the assessment; ascertained the extent of each holding in the village; estimated the growing crop, caused the threshed corn-heaps to be weighed; and apportioned the revenue accordingly. ¹⁰ He had to see that the cultivation was so conducted that the revenue might not suffer. He received

¹ Manu, Chapter VII, 115.

² Fifth Report, Vol. I, 18.

³ Rhys Davids '*Budhist India*,' 48.

⁴ See Manu, Chapter VII, 115.

⁵ See (1) above.

⁶ Campbell's *Cobden Club Essay*, 169 (226); Patton's *Asiatic Monarchies*, 81, *Land Tenure by a Civilian* 33, 76.

⁷ Zimmer's *Altendesches Leben*, 171.

⁸ MacDonell and Keith's *Vedic Index of names and Subjects under 'Gramani'*.

⁹ Harrington '*Analysis*' Vol. II, 67; Campbell's *Cobden Club Essays*, 163; Fifth Report Vol. II, 13, 157; *Land Tenure by a Civilian* 76; Robinson's *Land Tenure* 67.

¹⁰ Phillip's *Land Tenure*, 23.

the share of the King in food, drink, wood and other articles, which represented this King's revenue, from the villages and delivered the same in kind to the revenue Collector, and himself retained a portion thereof as his own perquisites.¹ He paid less than the other cultivators for his own holding.. This appears to have been his own remuneration as a servant of the State, and he had other emoluments which were derived from the village and were the payments for his services to the villagers².

The system of collecting the revenue in kind from the headman of each village was manageable only so long as the domain of the State was limited in extent. As petty states were amalgamated by conquest or otherwise, and as the country gradually approached the condition of a single government under a single sovereign, it became absolutely necessary to change a state of things so primitive and ill-suited to further stages of progress. Hence over these village communities was appointed a *graduated series of officers*, who represented the sovereign in due degree, and the administration of the country for fiscal and other purposes was left in their hands³. They were a lord of a village (who is no other than the headman of the village just spoken of), a lord of ten villages, a lord of twenty, of a hundred, and of a thousand villages⁴. The chain of officers so appointed had territorial jurisdictions within which they were responsible for the collection of the revenue as well as good behaviour of the villagers under them. They collected the King's share of the produce and had also police duties.⁵ Each within his own

Officers appointed for revenue and police purposes.

¹ *Manu Samhita*, Chap. VII, 119.

² *Ibid*, 30: *Land Tenure* by a Civilian, 78,80: *Fifth Report* Vol. II, 13,76.

³ *Apastambha*, *Prasna* II, *Palala* 10, *Kanda* 26, Verses 4—9: *Manu Samhita*, Chap. VII, 115—120: *Mahavarata*, *Santi Parva*, Chap. 1, Sec. 87

⁴ *Manu Samhita*, chapter VII, 115.

ग्रामस्थाधिपतिं कुर्व्याद्ग्रामं ग्रामं पतिं तथा ।

विंशतींशं शतेश्च सदसु पतिर्नैव च ॥

Kantilya Artha Sastra Book . Chapter ... *Sukra Niti*, Book Chapter

⁵ Max Muller's *India—'What can it teach us?'* 47: Elphinstone's *History of India*, Cowell's Edition, 22.

jurisdiction was engaged to repress crimes and report those that he could not repress to his immediate superior¹.

There remun-
eration.

The remuneration of these officers was thus provided for:—"The lord of a single village received in kind the share of the King in food, drink, fuels and the like. Above him, the lord of ten villages received an assignment of land that could be ploughed by two ploughs; the lord of twenty villages that of "ten plough" lands; the lord of a hundred, that of a village or a small town; the lord of a thousand, that of a large town². These officers were all placed under a minister at the capital³. They looked to the headman of the village for the due payment of the King's taxes and for assisting them in the investigation of offences. These officers of the King therefore had all lands attached to or the *revenues of lands appropriated for, their offices*. The offices usually went to the eldest son and these tenures gradually became hereditary. In course of time these lords of ten, or hundred or other groups of villages became, a class of *aristocracy* between the king and the people and ultimately petty Rajas. But only a few of them could survive the waves of foreign invasion.

Assignment,
of land-
revenue.

Self-govern-
ment within
village.

It may be noted here that the appointment of officers to rule over ten, twenty, a hundred, or a thousand villages means no more than that they were responsible for collection of taxes, and generally for the good behaviour of these villagers. It does not show that the entire country was governed by the central power with a chain of subordinate

¹ *Manu Samhita*, Chapter VII, Verses 116—117:—

यामि दीवान् समुत्पन्नान् यामिकः शनकैः स्वयं ।
शंसिदयामदशेशाय दशेशो विंशतीशिनं ॥
विंशतीशस्तु तत्सर्वशतेशाय निवेदयेत् ।
शंसिद यामशतेशस्तु सहस्रपतये स्वयं ॥

² *Manu Samhita*, Chapter VII, 118-119:—

यानि राज प्रदेयानि प्रत्यहं याम बासिभिः ।
अन्नपानेभ्यनादीनि यामिकस्तान्यवाप्नुयात् ॥
दशौ कुलान् भूञ्जीत विंशौ पञ्च कुलानि च ।
यामं यामशताध्यक्षः सहस्राधिपतिः पुरं ॥

³ *Ibid*, ... 120—121:—

राज्ञेभ्यः सचिवः क्षिप्रस्थानि पश्येदतन्द्रितः ॥
नगरे नगरे चैकं कुर्यात् सर्वार्थचिन्तकं ।

officers under its control and that there was no trace of self-government among the villagers. In fact the internal government of the village was left to the village community ¹. The village was, as we have said before, a corporation managing its own internal affairs. It was ruled by a council of elders, originally called the *punchayet* from the number of its members, and was presided over and represented in its fiscal and many of its other relations, by its headman. It administers justice to its own members as far punishing small offences and deciding disputes in the first instance.

Then again powerful chiefs or sovereigns for the maintenance of whose power large armies were necessary, were unable to pay them in money, for money did not exist in sufficient abundance; and so they *assigned* to them for their support *the royal revenue* claimable from specified tracts of territory, not infrequently conquered territory, in which as a matter of necessity they were quartered with their leaders, or the assignment was made on a district near which they were already stationed. Similar grants were also made for the maintenance of temples and of holy men, for the reward of public service, and moreover not infrequently in the exercise of royal munificence to favourites. It must be carefully borne in mind that what was assigned in all these cases was *not the land itself*, (for the king had no property in it) *but the right to collect the Government revenue* or the title due by custom to the government as yearly tax ². The grant was made of the *regalia* rather than of land.

Other cases
of assign-
ment of land
revenue.

Then there were many petty chiefs who had acquired a local position and influence before they came in contact with a stronger power to which they succumbed and in which they became absorbed. Though not strong enough to resist the absorption, they were yet able to make terms, and, retaining their former relation to those below them, they acknowledged a Sovereign over them by the payment of revenue.

Tributary
chiefs.

Then under the continual succession of wars, invasions, and internecine struggles which mark the history of every province, royal, princely and chieftain's houses were always gaining the lordship of territories and again losing it—gathering head, founding and acquiring dominions, and in time losing them, while the houses lost rank and were

¹ Max Muller's *India—What can it teach us?* 46—47.

² Field's *Introduction*, 34—38:

Ditto Land holding, 427—430: Rhys David's *Buddhist India*, 46

broken up. And when any of the greater conquests, like those of the *Pandavas* and the *Maurya* Emperors, occurred, the petty Kingdoms and principalities all over the country would go to pieces; cadets of families would break off and assume independance; and territorial rule would be lost, but the family would contrive to cling, by timely submission, and by favour of the conqueror, to relics of its possessions no longer as ruling chiefs.

Revenue
farmer.

Then there was another class of persons which is a growth in or over an existing village, of some one man who obtained a grant, or elevated himself by energy and wealth and developed a position out of a contract for *revenue farming*.

Rise of
aristocracy
between
Sovereign
and cultiva-
tor.

In course of time all these various classes of persons acquired a local position, influence and importance and their families, taking root in the locality, became the *germ of an aristocracy* between the sovereign, the village communities, and the peasant proprietors, variously known as *Rajas* and *Talukdars* and by other names.¹

Changes in
proprietary
right.

The rise of the aristocratic class, between the Sovereign and the village communities, though it did not make any changes in the internal management of the village, brought about *vast changes in the proprietary rights inside the groups*. The village formerly, as we have seen, contained a number of cultivating families who usually worked the land themselves with the aid of their members, but often employed tenants. The cultivators themselves were practically the *joint owners* of their several family holdings. These holdings were separate units; the cultivators did not claim to be joint holders of a whole area, nor did their holdings represent, in any sense, shares of what was in itself a whole which belonged to them all. They were however held together by their submission to a somewhat powerful headman and other village officers, and by the use, in common, of the services of the resident staff of village artisans and menials, who received a fixed remuneration on an established scale, and sometimes had hereditary holdings of service lands. Very often the headman was the person, who had led the party who first established cultivation and founded the village. The Raja had his own private lands; but as ruler of the whole country, his right was represented, not by a claim to general

soil-ownership, but by the ruler's right to revenue, taxes, cesses, and the power of making grants of the waste.¹

As long as the Raja or the chief held a great State as ruler, the original title of the soil-occupants was not interfered with, either in theory or in practice. The chief remains apart, receiving revenue, levying tolls and taxes, administering justice, with perhaps some vague claim as conqueror to be lord of all, but not claiming any actual concern with the occupied lands in the villages. And in cases of grants, we find that the management of a village, the whole or part of the Raja's grain-share, and the manorial rights (tolls, ferries, local taxes) were made over to the grantee. In the first instance, the grant is not intended to deprive any existing landholder or diminish his right; it usually makes over to the grantee the state-share of the produce and other state-rights in the village. But the grantee, in course of time, gets such a strong-hold in the village that he *regards himself as the owner of the whole place*. He retains or seizes upon villages, and the sense of lordship focussed as it were on the more limited area, become fixed on the land itself, and develops into a claim to be *owner of the actual acres of the village area*. The claim invariably results in the ultimate overshadowing of all preceding rights, and in time these became ignored altogether. The descendants of the grantees forget that the cultivators had any right independent of the lord and they manage to make them forget it too.²

Its usurpation by aristocracy.

Thus the grant of the royal prerogatives over the villages so far as fiscal matters were concerned, which were really the grant of *regalia* rather than the grant of land, tended to *depress the position of the actual cultivators and to turn them into tenants*, and gave rise to the view that the holders of such grants were landlords. Thus among over the village there arose a landlord or a body of landlords, claiming right over the entire village, intermediate between the Raja or the chief and the humbler body of resident cultivators and dependants. The important feature now is that there is an individual or a family (or a group of ancestrally connected families) which has the claim to be superior to other cultivating landholders, and in fact to be the *owner or landlord of the entire area* within the ring-fence of the village

Degradation of original proprietors into tenants.

¹ See Baden Powell's *Land Systems of British India*, Vol. I. 129—130 : 148 : Ibid, *Land Revenue in British India* (2nd Ed.) 69—71 : 73.

² Baden Powell's *Land Systems of British India*. Vol. I. 132, 134. Ditto's *Land Revenue in British India*, 75 etc.

boundary, as already existing or as established by their own foundation. They grew up over an existing body of cultivators whom they allowed to remain as their *tenants*. In this way there grew up landlord and over-lord rights over, and often at the expense of, other rights in land, and, as time goes on and the dominant grade of landlord confirms its position, the whole of the original landholders tend more and more to sink, along with the landlord's own located tenants and followers, into one undistinguishable mass of *non-proprietary cultivators*. Thus the old land-holding class, who originally had tangible, if not legally secured, rights in the soil, has now sunk into the tenant level¹. And as a matter of fact it was found extremely difficult to draw a line between the tenants who represented the original land-holders and those whose position was really due to contract. The menials and artisans who reside in the village now hold their lands and house-sites from these landlords and rendered them the services instead of to the entire villages in lieu of which they originally held them.

This change of idea as to the right over land and the status of the different classes of persons interested in its cultivation, though it began in the latter part of the Hindu Period, became an accomplished fact during the Mahamadan Period, as we shall see hereafter.

Two types of village—one developed from the other.

Mr. Baden Powell has very aptly called these villages as the "*landlord villages*" and contrasted them with the older class above described, which he has called the "*Raiyatwari villages*" and has pointed out that "in a large number of cases we can positively trace how the former has grown up over the latter which is the older village."² Whatever be the date of the "*Laws of Manu*," representing as it does the customs as established in Northern India, there can be little doubt that the only kind of village known to that author is the *raiya* village under a headman with an official free-holding of land³.

Baden Powell's *Land Systems of British India*, Vol. I. 133—134
Sir Henry Maine has remarked on the tendency of the recorded revenue-payer of the State to become proprietor (See *Village Communities*, 150, 3rd Ed.)

Baden Powell's *Land Revenue in British India*, 2nd Ed, 74—75.

Ibid, 88—89.

CHAPTER II.

THE MAHOMEDAN PERIOD.

THE RISE OF THE ZEMINDARS.

This was generally the state of things when the Mahomedans came into the country and conquered and settled on it. Before dealing with the course actually pursued by them with regard to the land, it is profitable to see what their *theory of land tax* was. Its principle was thus laid down in the *Hedaya* :—"If the Imam conquered a country by force of arms, he was at liberty to divide it among the Musulmans or he might leave it in the hands of the original proprietors, exacting from them a capitation tax, called the *zezyal* and imposing a tribute upon their lands, known as the *Kheraj*"¹. According to this theory the conquerer was considered as the *proprietor of the soil* of the conquered country, the doctrine of Aboo Yusoof being that the land was considered as lapsed for infidelity². The *Kheraj* was sometimes a proportion of the produce taken to be one-fifth or one-sixth of the actual crop, and hence subsequently came to be termed '*Mookasumah*,' and sometimes it was called *Wuzeefa* (something in obligation), the obligation to pay it being considered as "*a personal liability on account of a definite portion of land*," depending on its capability and not on its actual produce, and therefore remaining due so long as the land retained that capability, whether actually productive or not. It was thus a peculiarly suitable tax for unbelievers and was imposed on them when they were conquered.³

Mahomedan theory of land tax.

King proprietor of conquered land.

Imposition of *kheraj* on such land.

Mookasumah (i.e. share of produce) or *Wuzeefa* implying personal liability of tenant.

According to this theory the sovereign being entitled to a share of the produce, it was considered that something like *partnership was implied in the relationship of the sovereign and cultivator with regard to the produce*. But, according to another theory of the Mahomedan Law, the sovereign was considered the original proprietor of the land *so long as he received a share of the produce*, but as soon as he commutes his right to a share of the produce into a fixed rate in money, and, ceasing to take a share of the produce takes instead a fixed rate from the cultivator personally and

Substitution of fixed money rate for share of produce.

¹ Hamilton's *Hedaya* Vol. II, 209.

² Sarada Mitra's Tagore Law Lectures on *The Land Law of Bengal*, 23.

³ Baillie's *Land Tax*, XIX.

Divests King
of proprietary
right and
vests it in
cultivator.

Resemblance
of *Wuzeefa*
kheraj
to tax paid
by raiyat
in Hindu
system.

accepts his personal liability instead of retaining his hold upon the crop, he *ceases to be the proprietor*, and thereupon the *cultivator becomes the exclusive proprietor of the crop*; and as he cannot be ousted from his holding, at any rate as long as he pays the *kheraj*, he is to that extent the exclusive proprietor of the *land*¹. Thus in Mahamadan theory, the two modes of assessment implied theoretically a different ownership: the one in the sovereign, the other in the cultivator; and a change in the mode of assessment, which was in some cases allowed by law, would involve a change in the theoretical ownership². Thus the practical result of the commutation of the sovereign's share of the produce into a fixed money rate, was that it took away his proprietary right in the land. It was the same as if *the king was not the proprietor of the soil but was only entitled to rent*³.

This was, as we have seen, the view of the ancient Hindu law-givers regarding the King's right to the soil. Thus the land tax which the Mahomedans found in existence in India was analogous to their *Mo-kasumah* form of the *kheraj* (which was a proportion of the produce), since it was levied by a division of the actual produce as in Hindu times⁴. The *Wuzeefa kheraj*, depending upon the capacity of the soil and being independent of its actual produce, also closely resembled in those respects the tax paid by the resident cultivators of the village under the Hindu system⁵. In fact the whole of the assessment in Hindu times was of the same character; the non-resident raiyats being less bound to the land and more disposed to abandon it under pressure, but being equally obliged while they held it to cultivate and to pay the assessment, which was not remitted when they held but did not choose to cultivate it.⁶ Besides, in the persistent force both of the cultivators' right to the land and of his obligation to cultivate it and pay the tax, according to Mahomedan law, we find a strong resemblance to the position of the resident raiyats of the Hindu times⁷. Thus the revenue paid by the cultivators was similar to the *kheraj*

¹ Baillie's *Land Tax*, XVII.

² Do. do. XXIV.

³ Sarada Mitra's Tagore Law Lectures on '*The Land Law of Bengal*', 24.

⁴ Phillip's Tagore Law Lectures on '*The Land Tenure in Lower Provinces*', 54.

⁵ Baillie's *Land Tax*, XLIII.

⁶ Phillip's Tagore Law Lectures on '*The Land Tenure in Lower Provinces*', 46—47.
Ibid, 50.

they would have imposed, according to their own law, upon the conquered Hindus, and the rights and obligations of the cultivators were similar to those indicated by their own law.

The result of the similarities we have observed was undoubtedly a disposition on the part of the conquerors to allow the collection of the revenue to continue on the same principles as before, and this tendency was very much strengthened by the gradual nature of their conquests, their ignorance of the practical working of the system then in vogue, and their inability to take the complex details of revenue collection in their own hands. This policy of non-interference afforded further opportunity for the progress and development of the indigenous system and ultimately to the assimilation of the one with the other. Even in the capitals and large cities and such parts of the country as came under their direct rule and where only could their influence be most felt, *they did not impose kheraj formally as a new impost*, but merely collected the tax already imposed, making however early attempts to increase its amount.¹ Thus, in the early times of the moslem conquest, the position of the cultivator was very little modified, and the new government was content to go on upon the same footing as the native governments with regard to the revenue, and, while the tax resembled the *mookasumak kheraj*, the State did not claim to interfere with the proprietary rights of the cultivators nor claimed itself the right of property. But when the invaders had become firmly settled, they endeavoured to raise the amount of assessment and also to introduce a system which would, as they considered, make the collection of the revenue less burdensome to the subjects.

The system of land tenure introduced into the country by the *Pathan* Emperors greatly differed from the one now in vogue. Over and above the *rayatwari* and the *zemindary* tenures now prevalent in British India, there was the salary tenure or *jaigir* unknown in times when the State officials were paid in cash. With the exception of common soldiers, all the State servants used to receive grants of villages and lands in lieu of salary. All the *Sultans* of Delhi, except *Ala-ud-din Khilji*, paid their servants with the estimated revenue of the granted lands. The salary tenure was necessarily *non-hereditary* and dependent on the pleasure of the Sultan. The confiscated lands of the Hindu Princes and Chiefs constituted the *Khalsa* or

Assimilation
of Hindu and
Mahomedan
ideas.

Land tenure
during
Pathan rule.
Jaigir.

Khalsa.

¹ Baillie's *Land Tax*, XXVII—XXVIII.

² Patton's *Asiatic Monarchies*, 85—89 : Baillie's *Land Tax*, XXVIII.

Raiyatwari
and *Zemin-*
dary tenure.

Attempted
changes by
Ala-ud-deen.

Firoz
Tughluk.

Land tax.

Crown lands. People held them under the *rayatwari* tenure. The *Raes* and the *Rauas*, who submitted in time to the conqueror to escape plunder and confiscation and agreed to pay tribute, were allowed to hold their estates under the *zemindary* tenure. Intermediate between the zemindars and salary tenure-holders, there sprang up a class of independent Musalman land-holders who held proprietary rights in lands granted as free gifts by their sovereigns. *Ala-ud-din Khiliji* (1296—1316 A.D.), who was jealous of the power which land-ownership placed in the hands of the tenantry, *confiscated their estates* and transformed them into crown lands. By this high-handed measure many of the Musalmans of noble birth outside the State-services were degraded to the position of common labourers and the growth of a body of independent Musalman gentry thrown back a century. The Hindu *zeminders* fared no better under this grasping monarch. Although their estates were not confiscated, such a heavy tribute was imposed upon them that "nothing but proprietary rights were left". Sultan *Firoz Shah Tughluk* attempted to redress the grievances of the plundered proprietors and directed that every one having claim to "lands and ancient patrimonies of every kind wrested from the hands of their owners in former reigns should bring it forward in the Law Courts, and upon establishing his title, the village, the land or whatever other property it should be, should be restored to them". But we have no evidence to shew how far the descendants of the victims of plunder were benefited by this magnanimous ukase. He revived the system of remunerating Government officials by *assigning to them the land revenue from a villages*, a mode which Ala-ud-din had condemned. But the assignments then made appear to have been mere orders to receive a particular sum and involved no right to manage the village or otherwise interfere with it.

As to the scale of the land tax it was not very heavy under the early Sultans. But *Ala-ud-deen Khiliji* attempted the exaction of the full half of the gross produce from the cultivators—the *marimum* which could lawfully be demanded even from a conquered country (according to Mahomedan Law),¹ and directed that this heavy revenue should be a *fixed rate* assessed upon measurement, *instead of a proportion of the produce*. This

N.B. These must be distinguished from the class who came to be afterwards called *zemindars*. They were really tributary princes.

¹ Patton's *Asiatic Monarchies*, 85-89: Baillie's *Land Tax*, XXII, XXX, XXXII.

really amounted to the imposition of *Wuzee fa Kheraj* the payment of which gave the cultivator an exclusive proprietary right in the land.¹ He also imposed a *house tax* and a grazing tax. But these regulations came to an end after his death, and the cultivators continued to render the revenue according to the old system. His successor *Kutub-ud-din* reduced the rent.

After him *Ghias-ud-din Tughluk Shah* "gave orders to his counsellors that on no account should they levy a tax of more than one-tenth or one-eleventh on the districts or provinces". Never before in the history of the country was land revenue assessed at such a low scale. The successor of Tughluk Shah thinking that "he ought to get ten or five per cent. more tribute from the Doab" repealed the land regulations of his father. But they were revived by *Firuz Shah Tughluk* who "settled the *Kheraj* at tenth from cultivated lands". He also constructed a double system of canals about 80 *kos* in length near about the new city founded by him, which proved of immense benefit to the raiyats in regions traversed by it, and imposed an *irrigation cess* of 10 per cent. on the outlay.

Our authorities never speak of the *tenantry* otherwise than as *tax-payers*. But of the landed aristocracy there were detailed descriptions given. During the 13th century when the Empire was in the course of construction, the *zemindars*, on taking the oath of allegiance to the Throne, were treated rather as *tributary princes* than as mere subjects. Their condition is best described by Sultan Ala-ud-din himself in a conversation with an eminent *Kazi* reported by Barni :—"They * * * make war upon each other * * * but the *Kheraj* (tribute) *jiziya* (Poll-tax), *Kari* (House-tax) and *chari* (Pasture-tax) they do not pay one *jital*. They levy separately *khuts* (Land-owner's share) from the villages * * * and many of them pay no revenue at all either on demand or without demand."²

The revenue settlement made during the reign of the Mughul Emporor Akbar, the Great, by his Hindu Finance Minister, *Raja Todar Mull* remained essentially in force for very many years down to the establishment of the British

¹ Baillie's *Land Tax*, XXII, XXXIII.

² For authorities vide Minhaj's *Tobakat-i-Nasari*, English Translation by Major Raverty (Bibliotheca Indica) : Elliot's *History of India* Vol. II—III : Barni's *Tarikh-i-Firuz Shahi* (Dowson's Translation) all of which deal with the Pathan period.

rule in India. All subsequent assessments made by the Musulman rulers were based on Todar Mull's system, and although the amount was increased in various ways, there does not appear to have been much, if any, alteration in the primary assessment handed down from Akbar's time.

Substitution
of money
rate for share
of produce.

For the purpose of assessing the revenue the lands of the country were distributed into four classes according to their productive capacity. The average produce of the *Bigha* of land of each description was ascertained and the Government share was then calculated, one-third being the full demand, and deduction being made for fallows, occasional inundations and droughts, inferior soils, &c. The average dues of the State (in grain) being thus ascertained, the great object of *Todar Mull's* settlement was to *substitute a fixed money rate for the Bighas instead of the share of the produce*, which had all along been prevalent. And accordingly the grain rates were commuted into money on an average of the price currents of the nineteen previous years and the rates so obtained were calculated on the land of each raiyat, and the revenue was fixed at a certain sum whatever might be the crop actually grown. This mode of paying the revenue was not obligatory and the cultivator had the option of paying either in money or in kind.¹

Settlement
with raiyat
direct.

The settlement made by *Todar Mull* was a *settlement made with the ryots*; whatever claims the class of persons, who came afterwards to be called *Zemindars*, had at the time to collect the revenue, their claim to distribute its burden among the cultivators had either not grown into a right or was deliberately ignored. Even the headman seems to have been put aside. As pointed out by Sir George Campbell:—"There can be no doubt that settlement attributed to *Todar Mull* * * * dealt primarily with the individual ryot and fixed the sum payable by him for the land which he cultivated. * * The payments of the ryots were fixed by an act of State quite independent of the will of any other subject or of any question of competition or relation of landlord and tenant in the English sense. Whether the revenue was paid direct to the officers of Government, or by the village communities jointly through their headman, or through hereditary *Zemindars* of a superior grade, the quota

¹ Baillie's *Land Tax*, XXIX—XXXIII: *Ayeen Akbary* (Gladwini's Translation) Vol. I. 358—364: Phillip's *Land Tenure*, 71—72.

due from each ryot was fixed and recorded ; that was the unit from which all calculations started.”¹

Under the Mughul system every *Bigha* of land cultivated by the ryot must have been cultivated under an express or implied engagement that a certain sum should be paid for each *Bigha* and no more, and that the rents of an estate can only be raised by inducing the ryots to cultivate the more valuable articles of produce or by clearing the extensive tracts of waste land which are to be found in almost every Zemindary in Bengal², and it appeared to be a general maxim that the immediate cultivator of the soil duly paying his rent should not be dispossessed of the land which he occupies³.

Enhancement
of rent and
ejectment of
tenant.

The commutation of the State-claim to a share of the produce for a fixed money rate was, according to Mahomedan Law, not only a formal imposition of the *Kheraj*, but of the *wuzeefa* instead of the *mookasumah* form of that tax, and, as we have already seen, according to the moslem jurists, the deliberate imposition of a money tax is a distinct recognition of the absolute proprietary right of the cultivator in the soil, and the substitution of *wuzeefa* for the *Mookasumah Kheraj* likewise operates as a transfer of the sovereign's right in the soil to the cultivator. Theoretically, therefore, from the time of Akbar's settlement, the cultivator became the absolute proprietor of the land, at any rate where the revenue was paid in money instead of in kind. But whatever might be the theory, we cannot find sufficient ground for saying that there was any intention on the part of the State to transfer its proprietary rights to the cultivator, the bulk of whom had indeed rights similar to those which would belong to the *wuzeefa-Kheraj*-holders, especially as its only object in making the change was to collect the revenue on an improved system less burdensome to the *raiya*t⁴. Thus the nature of the tax imposed and the mode of levying it do not appear to affect very materially the nature of the rights in the land.

Proprietary
right not
formally
invested in
tenant.

But the rights of the tenants however came in process of time to be very materially affected by the machinery employed by the Musulman rulers for the collection of the revenue.

Cultivator's
right affected
by Mahomedan
revenue
system.

¹ The Great Rent Case—B.L.R. Sup. 245—246 per Campbell J.

² Minute of Cornwallis, dated, 3rd February 1790.

³ Harrington's *Analysis*, Vol. II. 139

⁴ Phillip's *The Law Relating to the Land Tenure of Lower Bengal*
—Tagore Law Lectures 1874-75, 71—72.

Revenue
Collectors.

tion of the revenue rather than their theory regarding land tax and the right to the land. For that purpose they at first utilised the agencies existing in ancient Hindu times for the collection of the king's share of the produce of the soil with such modifications as were required by the changed circumstances. They collected the revenue in much the same way as the Hindu rulers had done, with the intervention in some cases of the conquered Hindu *Rajas* or powerful personages of the district. The headman, therefore, where the village communities were in their vigour, continued to collect the State share of the produce; elsewhere he was displaced. The Raja, to whom he was in the habit of paying the revenue, either became tributary, retaining his possessions and receiving the revenue, as before; or became a superior collector of the revenue receiving it from the headman and making himself responsible for it to the State; or he was displaced altogether and took no part in the new system. Again, many of the conquered *Rajas* were allowed still to receive the revenue, not in the limited capacity of revenue collectors, but for their own benefit, on condition of rendering military service, and by grant from the conquerors. Such a grant of revenue was called a *jaigeer*; and in all such cases the old system continued in its integrity. When the former Raja was placed in the position of a superior collector of revenue from a conquered district, which he had once ruled and from which he had been accustomed by hereditary right to receive the revenue for his own benefit, there was great tendency on his part to *absorb the proprietary rights and to depress the headman and weaken the influence of the village community*. The same observation applies in different degrees to all the different revenue-collectors who had been employed under the old system—whether an ancient Raja, a farmer of revenue, a *jaigeerdar* or a village headman. A struggle began between his hereditary and beneficial or proprietary right derived from the old system, and his purely personal and official right derived from the Mahamadan rulers, which was repugnant to the hereditary right. In the end the Hindu ideas still held their ground though they did not obtain a complete mastery. The Hindus clung to their hereditary principle and the Mahamadans sought to cut it down as much as possible, and, where it proved too strong for them, insisted at least upon the formal recognition of their right of choice, for instance by requiring the acceptance of a *Sanad*. Besides, the recognition of no one below the chief collector of revenue, whether headman or Raja, enhanced the rights of the revenue-collectors against all below them,

Their
hereditary
claim to office

and thus gave them the means of *encroaching upon the rights of both the State and the cultivators* ¹ At the end we find these revenue collectors became too powerful. Having thus grown out of ancient Rajas, native chiefs and robber-leaders, and out of the various State officials, civil, military or revenue, including the village headmen and farmer of revenue, they acquired in course of time a *right to collect* the revenue of the districts varying in size and importance. It was *purely an office originally tenable at the will and pleasure of the sovereign power*, and, in the confusion of later times, they assumed, and the government recognised a *hereditary right in the office*. Though they thus became hereditary officers, they were still only *officers* and in theory bound to account to the State for all they had received, which either was to be paid over to the State, or to be appropriated by them in the authorised way for their allowances. But as the State fell into confusion, the difficulty of constant minute investigations by its officers tended to make the arrangement between them and the State as to the amount of revenue a mere *continuation of the existing arrangements* with little reference to the actual assessment of the ryots by themselves. They then still further encroached upon the rights of the State and the cultivators and ultimately came to pay to the State a *fixed sum* which was very loosely estimated and to appropriate the surplus, whether equivalent to allowances or more and to exact more and more from the ryots for their own benefit². The Hindu root of hereditary claims, combined with the greed of the rulers for more and more revenue continuing to develop their influence, and in course of time these collectors of revenue under the name and style of the *Zemindars*, absorbed the rights of all below them and encroached upon the rights of the State as well, until they *usurped the proprietary right in the soil*, displacing to a great extent the village headman. The consequence was that the village fiscal organisation fell into decay, and its growth and further development became arrested. The *Zemindar* thus became by usurpation a hereditary officer with a right to engage with Government for the payment of the revenue on the one hand, and on the other, with a right to collect the State share of the produce or its money value and to pay over to the State what had been engaged for after deducting his own emoluments.³

Their
obligation
to pay fixed
revenue.

Their
usurpation
proprietary
right to soil.

¹ Phillip's *Land Tenure*, 57—60.

² Phillip's *Land Tenure*, 97, 108.

³ *Land Tenure by a Civilian*, 73 : *Fifth Report*, Vol. II, 12 : Harrington's *Analysis*, Vol. III, 340, 363 : Paton's *Asiatic Monarchies*, 144—45.

Their power
to enhance
rent of
raiyyat.

Limited by
custom.

Raiyyat not
liable to
ejectment so
long as he
paid
Customary
rent.

Imposition of
additional
cesses.

The *Zemindar*, having thus settled with Government, the amount of revenue, proceeded to distribute the assessment amongst the cultivators. He was bound to demand from them only what was sufficient to meet the Government revenue and such allowances as were payable by the raiyyats, and was held bound to bear himself the loss arising from any ordinary failure of crops and to yield the stipulated amount of revenue notwithstanding. And in this way a door was opened for the *Zemindar's exactions*.¹ The *Zemindar* was however, to some extent controlled in his assessment by *custom* which required that the rates *usually paid* by the village should be adhered to at least in form.² As Mill says:—"In India and in all Asiatic communities similarly constituted, the raiyyats or peasant-farmers are not regarded as tenants-at-will, nor even as tenants by virtue of a lease. In most villages there are indeed some raiyyats on this precarious footing, consisting of those, or the descendants of those, who had settled in the place at a known and comparatively recent period; but all who were looked upon as the descendants or representatives of the original inhabitants, and even mere tenants of ancient date, are thought *entitled to retain their land as long as they pay the customary rents*. What these customary rents are, or ought to be, has indeed in most cases become a matter of obscurity; usurpation, tyranny and foreign conquest having to a great degree obliterated the evidence of them * * * * But when the details of the revenue system came to be enquired into, it is usually found that, though the demands of the great landholder, the State, have been swelled by fiscal rapacity until all limit is practically lost sight of, it has yet been thought necessary to have a *distinct name and separate pretext for each increase of exaction*; so that the demand has sometimes come to consist of thirty or forty different items in addition to the nominal rent. This circuitous mode of increasing the payments assuredly would not have been resorted to if there had been an acknowledged right in the landlord to increase the rent. Its adoption is a proof that there was once an effective limitation, a *real customary rent*; and that the understood right of the raiyyat to the land so long as he paid rent according to custom was sometime or other more than nominal."³ Thus even in the decline of Governments,

¹ Phillip's *Land Tenure*, 111—12.

² Harrington's *Analysis*, Vol. III, 324: *Land Tenure* by a Civilian, 59.

³ Mill's *Political Economy*, Book II, Chap. iv, page 148.

when the State-control became relaxed and the ryots became subject to much oppression on the part of those placed over them, they still had some protection in the only ever-surviving law of the east,—‘*custom*,’ which even the worst oppressors could not openly defy. Hence all extortions and imposts took the shape of *extra cesses* levied on various pretexts and, as pointed out by Mill :—“the shape in which they were taken, and the survival beneath all imposts of the old customary rates is the strongest evidence that the right of the ryot survives to become again beneficial in better times.”¹ This was with regard to the resident hereditary cultivators of the village. But there appears to have been another class of cultivators who did not form part of any village organization, and with these the Zemindars could deal untrammelled. Akbar had strictly forbidden all exactions beyond the assessed revenue, but the prohibition had been ineffectual. Indeed, in spite of continued prohibitions from the time of Akbar, exaction of cesses continued. The *Zemindar*, like the State in Mahamadan times, by thus imposing special taxes avoided as much possible the appearance of increasing the assessment, wisely preferring to attain his object in an indirect way.²

This practice of exacting unauthorised contributions from the ryots, ultimately established itself so completely that at length it came to be considered that the zemindar was entitled to all he could squeeze out of the ryots and he gradually grew to be looked upon as a sort of *landlord in his relation to the ryots* and a sort of *tenant in relation to the State*. But he did not at once lose his position as public officer. The proprietary character of the Zemindar however tended to strengthen itself while the official character tended to be ignored, except as a useful auxiliary to the proprietary right. And before the British rule began the proprietary character had to so large an extent absorbed the official character that when the English ideas were applied to the relations between the parties it was natural to look upon the *Zemindar as the rent-receiving landlord entitled to the soil and paying only a tax to the State*.³

Zemindar came to be regarded as landlord.

Where the village headman continued to collect the state-share of the produce, he distributed the assessment amongst the villagers and realised the revenue from the cultivators and paid the same into the Treasury or to the

Village headman displaced.

¹ The *Great Rent Case*—B. L. R. Sup., 245—46 Per Campbell, J.

² Phillip's *Land Tenure*, 111—13, 127.

³ Phillip's *Land Tenure*, 97, 108.

Disintegration of village community.

superior revenue authority. In later times the *headman* generally *sank into the position of a subordinate revenue payer* paying revenue not direct to the Treasury or to the superior revenue officer but paying *through a Zemindar*. These Zemindars, as we have seen, generally contrived to absorb the functions or at least the chief emoluments of the headman and to displace him to a great extent. The *village community* appears to have gradually sunk and to have *lost its importance as a fiscal unit*, although it may have retained and perhaps *intensified its social influence*. Its principle as the outcome of the joint family, was alien to the Mahomadan ideas of personal and individual right, joint families being unknown amongst the Mahamadans. The influence of the Mahamadan ideas and the effect of a period of disorder and disruption seem to have resulted in the disintegration of the village communities. The power of the Zemindar has to a great extent, been built upon the ruins of the Hindu system. They were at first recognised as officers, or partly as officers and partly as persons with a certain interest in the revenue received from the Hindu times; but the indirect effect of their recognition by the State at a time when the old Hindu forces of joint property and hereditary right were weakened, tended to give them a larger right than they had ventured to claim. Thus, although little was formally changed at the Mahamadan conquest, the seeds of much practical change were sown.¹

Temporary farming of revenue—Its effect.

On the break up of the Mahamadan rule on the death of Aurangzib in 1707, *i.e.*, 60 years before the British rule of the country began under Warren Hastings, which were years of anarchy and chaos, the rapacity of those puppets that disgraced the throne of Akbar, the Great, introduced the system of *temporary farming of the royal revenue* to sharking adventurers for lump sums of money. These middle-men also, like the Zemindars, came in time to deprive the cultivators of the soil of their proprietary right and usurped the same themselves.

Subletting by Zemindars—Its effect.

As the Government had delegated its authority to the Zemindars, and created interests between itself and the cultivators, without vigilantly maintaining the ancient checks and restrictions, the Zemindars in their turn delegated their authority to under-renters and farmers and inaugurated the *system of sub-tenancy*. These mercenary under-farmers and

¹ Phillip's *Land Tenure*, 62—63.

rentors had become very oppressive to the raiyats in later Mahamadan times.¹ In the days when Mahamadan rule was vigorous there was little intermediate tenure between the State and the people; but in proportion as the central power declined smaller authorities rose.² With the break up of the Mughal empire and the increasing independence of the provincial Government, the leasing of the revenue became common, the control over the farmers became less, the collection of the land revenue became disorganised, and the only limit to exactions from the raiyats was, as pointed out by Sir John Shore, the raiyat's ability to pay.³

Thus there is nothing in the history of India during the period of Mahamadan rule to lend colour to the theory that the Mahamadan rulers regarded themselves as the proprietors of the country's soil. The body of middle-men whom they were compelled to engage for realising the revenue from the Hindu subjects were never invested with the right of proprietorship over the land which had from time immemorial been enjoyed by the cultivators of the soil.

But the Mahomedan conquest of India was never complete. In the major part of the country where they extended their rule, the hereditary Hindu kings or chiefs were not disturbed. They were allowed to retain possession of, and to rule, their kingdoms on their agreeing to pay a tribute to the conquerors, and the internal government of their states under such arrangement was not disturbed and the revenue system of the Hindus were left unaltered. Thus there also the proprietary right in the soil remained as before.

Attempts were made by Nawab Suja Khan and after him Murshidkuli Khan to curb the powers of the Zemindars but they signally failed.

¹ Phillip's *Land Tenure in Lower Bengal*, 62—63.

² *Fifth Report*, Vol. II, 59—60, 76, 90—91, 96—97.

³ Campbell's *Cobden Club Essay*, 141—142.

CHAPTER III.

THE EARLY BRITISH PERIOD.

The Permanent Settlement with the Zemindars.

Grant of
Dewany
E. I. Co.

Position of
Zemindars.

On the 12th August 1765, Shah Alum the titular Mughul Emperor of Delhi made a perpetual grant to the English East India Company, of the *Dewany* or the revenue administration of the three Provinces of Bengal, Behar and Orissa. The nature and incidents of the position to which the company thereby succeeded have formed the subject of some controversy but this discussion does not now possess more than an academic interest. When the East India Company took up the administration of revenue in the provinces, the zemindar was the most important personage in the revenue system and the nature of his rights puzzled them very greatly. As already noticed, originating in diverse circumstances, the zemindar became by a kind of usurpation, a hereditary officer, with a right to engage with Government for the payment of revenue and to pay over to it what has been engaged for, after deducting his own emoluments. He was a hereditary *officer*, but only an officer and in theory was bound to account to the State for all he had received, which was either to be paid over to the State or to be appropriated in the authorised way towards his allowances. But the zemindar afterwards encroached upon the rights of the State and of the cultivators and ultimately came to pay to the State a *fixed sum* (much less than the rents collected) and to appropriate the surplus, whether equivalent to the allowances or more. He further exploited new sources of income, over and above the rental upon which his revenue was calculated, and imposed *illegal cesses* or additions to the rent-rates upon their raiyats. This practice of exacting unauthorised contributions ultimately established itself so completely that at length it came to be considered that the zemindar was entitled to squeeze out of the raiyat all he could and he gradually grew to be looked upon as a sort of landlord in his relation to the ryots and a sort of tenant in his relation to the State.

On their accession to the Dewany, the East India Company had to solve the problem of the tenure of land and to decide the question to whom the ownership thereof belonged.

Dr. Field writes¹ :—"that the mutual rights of the zemindars and the raiyats were in confusion and uncertainty when the East India Company acquired the Dewani in 1765; that between 1765 and 1793 no effectual steps were taken to ascertain and define those rights;—that Mr. Hastings and Mr. Shore whose experience of the subject should have given weight to their sentiments, were of opinion that before any settlement was made those rights should be defined and adjusted;—that Lord Cornwallis and the Court of Directors, putting aside the advice of Indian experience, deliberately refrained from any such definition or adjustment." After some controversy they came to the conclusion that the zeminders in Bengal had acquired, if they did not originally possess, a *proprietary right in the land which justified a permanent settlement with them*. By a process of false analogy they attributed to the zeminders a position similar to that which was held by land-owners in England. An English landlord or free-holder in fee simple has absolute liberty to dispose of all lands forming part of his estate, to oust his tenants, whether for life or for a term of years, on the termination of their respective lease-holds, and to enhance the rents on the expiration of leases at his discretion. But the fact really was that no class in Bengal owned the land in the sense in which an Englishman owns his estate and there was no kind of ownership which corresponded to that aggregate of rights—the highest known to English law,—termed the *fee simple*. The Bengal zeminders did not possess so unlimited power over the *khud kaskh* and other tenants, as the English landlords do. And, as pointed out by Harington :—"It is by attempting to assimilate the complicated system which we found in the country with the simple principles of landlord and tenant in our own and specially in applying to the Indian system terms of appropriate and familiar signification which do not, without considerable limitation, properly belong to it, that much, if not all, of the perplexity ascribed to the subject has arisen."²

Permanent Settlement of land revenue with them.

Both Lord Cornwallis and the Court of Directors under the influence of English ideas, honestly, though mistakenly, believed that the zemindars and raiyats would adjust their mutual relations by contract among themselves. But the belief, as we shall see later on, was falsified to the fullest extent. And one of the effects of making a permanent settlement with the zemindars was that all other rights in land were

Its effects.

¹ Field's *Landholding &c.*

² Haringtons *Analysis*, vol. III 398.

effaced. It swept away the distinction between the different classes of zemindars, as also between raiyats having customary rights and others of a precarious footing dependent on mere contract. The rights which now exist are nearly all of recent growth dating from or after the Permanent Settlement.

We shall deal with these matters in detail in a subsequent chapter.

PART I

THE ORIGIN AND GROWTH OF OCCUPANCY RIGHT.

CHAPTER I

THE HINDU AND THE MAHOMEDAN PERIODS.

The Origin and Growth of Occupancy Right.

Our studies into the history of land tenure in ancient India have cleared the ground and removed many of the misconceptions about the right of the tenant to enable us to trace the origin and growth of occupancy right. From what has been already stated it will appear that the village community, originally consisting of the joint undivided families, was, owing to the urgency of the struggle for existence, compelled to admit into the brotherhood strangers from outside, which seemed at first to be forbidden by its very constitution; that when these stranger immigrants offered unmistakable proofs of settling in the village as its permanent inhabitants, ready to undertake their shares in the responsibilities attaching to that position, they were absorbed into the village group; that when, with the establishment of settled government or from other causes, the struggle for existence ceased to trouble the community, it refused to absorb the alien population, and the new-comers were then admitted into the village only on the terms of paying rent for the use and occupation of land; that as soon as they once for all settled in the village on terms, they were given a position, though subordinate to other members of the village, that is to say as *tenants*. They had then all the rights and privileges of the community extended to them. It was the residence in the village that gave them the status of members of the village community with all the rights and obligations implied in it. So long however as they did not settle in the village but were mere sojourners into it, they were not assimilated into the group. Thus arose the distinction between tenants who settled as permanent inhabitants of the village

Origin of
tenancy.

Rise of
landlords.

and the temporary sojourners or cultivators from another village. In course of time there arose, intermediate between the King and the village community, a class of aristocracy variously known as *Rajas* and *Taluqdars*. It was a growth among and over the original community and owed its origin to the system of assignment of the King's revenue in the shape of the share of the produce of the soil. In all these cases it was only the right to collect the Government revenue that was at first assigned to these people, and not the land itself. But as decades passed they gradually assumed what may be called landlord-right, and usurped the proprietary right, over the entire village. The result was that the original members of the village community, who were themselves the proprietors of the village they occupied, were reduced to the position of mere *tenants under these landlords*, and all the distinctions that existed between them and those that settled in the village as tenants under them were lost.

Two classes
tenants—
Khud Kasht
and
Pai Kasht.

In the course of the ages and the changes that have taken place in the political condition of the country, the old Hindu names have mostly disappeared, but in later times these tenants of the village came to be known as '*chapper-band*' (literally '*House-tied*' or one who has his 'roof' or house fixed in the village), '*thani*' (from *Sthaniya*, place, a Hindi word), '*basinda*' (resident), '*kaimi kadari*' (permanent and hereditary) and '*maurasi assamis*' (hereditary tenants) and under the Mughals as '*khud kasht*' *raiya*ts, (that is *raiya*ts who cultivated the land of their own village or the village in which they resided, the word being derived from *khud*—own and *kasht*—cultivation.)¹ The other class of *raiya*ts, *viz.*, those who cultivated the lands of the village but did not settle in it, was called *pahi kasht* *raiya*ts (from *pahi*—near or foreign, *kasht*—cultivation, meaning a man who came from abroad and took up land to cultivate without belonging to the village permanently). The word *pahi* is frequently confounded with *pai* (literally a foot, hence used to mean an under-tenant) and the '*pahi kasht*' *raiya*ts have come to be called *pai kasht* *raiya*ts, and this has led to much confusion in law rendering it possible that the rights and liabilities of the under-tenants have been transferred to the non-resident cultivators.²

¹ See Finucane and Amir Ali's *Introduction to Bengal Tenancy Act*, 1st Ed., 4.

² Grierson's *Bihar Peasant Life*, 326.

There is some conflict of opinion regarding the origin of the *khud kasht* raiyats. According to Dr. Field, the *khud kasht* raiyats were *outsiders* who were permitted by the original descendants of the patriarchal family to settle in the village and had to contribute to the Raja a share of the produce as Government revenue and to the village community something in addition¹. According to Mr. Baden Powell, on the other hand, the *khud kasht* raiyats were not settlers from outside, but the *original members of the village community* who cultivated their own land, and were liable for the shares of the Government revenue and for nothing in addition. The *khud kasht* or settled raiyats were in fact, according to this view, proprietors of the soil which they cultivated, so far as any notions of proprietary rights existed in those early times.²

Conflicting theories of their origin

According to Field.

According to Baden Powell.

But, as has been already stated, before the rise of the landlords, the village cultivator was either a member of a body which had cleared the waste and established the village, or had become, by conquest or grant, at some remote date, the virtual owner of it. But there were always others in the village, who were originally outsiders but subsequently settled in the village, and, though not on the same footing, were nevertheless resident and privileged cultivators who accepted the village lands as tenants on condition of paying rent to the proprietors for its use and occupation. When the proprietary right of the village cultivators (the original members of the village community) became lost or obscured by the turmoils of the times and the influence of the overlords, both the *original owners and their resident help-mates* or cultivators (the *tenants*) became practically undistinguished. *All became raiyats under the landlords.* But as both were not liable to eviction, both came to be equally called *khud kasht*, which implied tenants cultivating in their own village. Thus the original members of the community who founded the village, the strangers from outside who had settled in the village at a remote period and were soon afterwards assimilated into the village community, and those who had settled in the village at a later period but were not so

Right view.

See Field's *Introduction to Regulations* 30—31: Ditto's *Land holding*, 422—423: also Finucane and Amir Ali's *Introduction to B. T. Act*.

Baden Powell's *Land Systems* Vol. I, 598—599:

Ditto's *Land Revenue*, 133—139:

See also Elphinstone's *History of India*, 9th Ed., 73—74. and Finucane and Amir Ali's *Introduction to B. T. Act*.

assimilated into the community but remained there as tenants—all of them went to form the class of raiyats who came to be subsequently called *khud kasht* raiyats.

The privileges of the *Khand Kasht*. Whatever might the origin of these raiyats, they had certain recognised privileges according to the custom of the country. It has been already shewn that according to our ancient Sanskrit Sastras the *proprietary right* in the land always vested in the cultivators, and that the King was only entitled to a share of its produce and was never regarded as its proprietor. And as the proprietary right carries with it the right of possession, there can be little doubt that the cultivators in ancient times had also the *right to occupy* the land. The rise of the class of landlords between the king and the village community, did not disturb the cultivators in their occupation of land, although it deprived them, in course of time, in theory at least, of their proprietarship in the soil. For if we admit the property of the soil to be vested in the landlords (or zemindars,) we must exclude any acknowledgment of such right in favour of the raiyats, except where they may acquire it from the proprietors. *Pattas* to them are generally given *without any limitation* period and express that they are to hold the lands paying the rents from year to year. They have thus a sort of *prescriptive right* to continue as tenants so long as they paid the usual rent. The sentiment and feeling of the country were certainly in favour of the *moral claim* of this class to hold the land as long as they cultivated and paid their rents. Hence the *right of occupancy originates*, and it is generally understood that the raiyats by long occupancy acquire by prescription the privilege or right of possession in the soil as long as they pay the usual rent and are *not subject to be removed*. And, being as a rule a man of the village in which their holdings are situate, they have in many parts enjoyed the privilege of holding the possession of their lands even *hereditarily*. And it is conclusively established that their holdings ultimately became *hereditary*. From none of this class could any rent be demanded except what was fair according to received ideas or in other words *customary rent*. It is equally understood as a prescriptive law that the raiyats who holds this tenure *cannot relinquish* any part of the lands in their possession or *change the species of cultivation* without a forfeiture of the right of occupancy, which, however, is rarely insisted on. But this right also authorised them to *alienate the lands* rented by them and in their possession, though to a limited extent, and it is so far distinct from

Right to occupy land.

Ejectment.

Hereditary

Alienation.

a right of property, the right of disposing of by sale, gift or other modes of transfer, still continuing, under limitation, with the landholder (*zemindar* or *talukdar*) exclusively. And in a state of society when there was plenty of unoccupied land and population sparse, the competition being not amongst tenants for lands but amongst landlords for raiyats, it gradually became the custom *not to evict* them so long as they pay their rents.

The other class cultivate the lands belonging to a village where they do not reside. They are avowedly mere temporary sojourners, or who without sojourning at all, came from some other village to cultivate patches of land. They are considered as *tenants-at-will*, and having only a temporary accidental interest in the soil which they cultivate, will not submit to the payment of so large a rent as the preceding class, and when oppressed, easily abandon the lands to which they have no attachment. They hold these lands upon a more indefinite tenure. The *pattahs* to them are generally granted *with a limitation in point of time*; and, where they deem the terms unfavourable, they repair to some other spot. They therefore could not be made to pay very high rent. And though originally tenants-at-will and theoretically liable to ejectment, until the demand for land exceeded the demand for cultivators, competition being then for tenants rather than for lands, in practice no ejectment could actually take place. But as this economic position was reversed, the inconveniences of tenancies-at-will became apparent, and they gradually gave way to tenancies of more fixed character, either from year to year or for a greater interest. And while the tenancy was at will, it could not obviously be *hereditary* for it would of necessity be terminated by the raiyat's death. But with the greater fixity of later times it would no longer be so, and on the raiyat's death there would be an interest that could devolve on his heir, even though the tenancy was from year to year.¹

Of the
Pai Kasht.

¹ *Extracts from Harington's Analysis*, 252, 267, 272, 300—301: set also Field's *Land holding and the Relationship of Landlord and Tenone* 15,424 *Directions for Revenue Officers*, 5,61—62: *Fifth Report*, Vol. II. 299—301, Harington's *Analysis* Vol. II, 64, Vol. III, 356 460 Campbell's *Cobdens Club Essay*, 165: *Land Tenure* by a Civilian 66, 68, 80: MacDonell's *Minute* paras 12—15 in Gazette 1884—85: Okinialy's *Note*, Gazette 450—457.

CHAPTER II.

THE BRITISH PERIOD.

THE SUPPRESSION OF OCCUPANCY RIGHT.

—*Effect of the Permanent Settlement.*

Permanent Settlement : This was generally the state of things when the English East Indian Company assumed the *Dewany* of Bengal, Behar and Orissa, which imposed upon them the task of collecting the land-revenue, and so brought them face to face with the problem of the tenure of land prevailing in the province. Laborious investigations into the rights of all persons possessing any right and interest in the land were set on foot, which ultimately led to the *Permanent Settlement* of land-revenue in that province.

On status of Zemindar.

The modifications which the Permanent Settlement introduced into the relations between the Government and Zemindars are specifically set forth in the Proclamation of 1793, which was afterwards enacted into Regulation I of the same year. The Proclamation included two principal provisions: it *fixed for ever the revenue* which had been assessed on the various estates at the Decennial Settlement which had just been concluded, and it declared the *settlement-holders*, whom it designated "*Proprietors of the lands*"¹, "*privileged to transfer to whomsoever they think proper, by sale, gift, or otherwise, their proprietary rights in the whole or any portion of their estates, without applying to Government for its sanction to the transfer.*"² It is clear therefore that the intention and effect of the Proclamation was to abandon, on the part of Government, the right to increase the revenue assessed on the estates of the Zemindars, and, (subject to summary sales for non-payment of that revenue), to constitute the Zemindars, *as far as the Government was concerned, owners of these estates.*

On status of raiyat.

But the rights which the Government possessed were admittedly not exhaustive of all the interests in the land. Under the customary law of the country, as admitted by the authors of the Permanent Settlement, the raiyats too had rights which it was not discretionary with the Government to alter or annul. Those *customary rights of the*

¹ Regulation I of 1793, Sec. 3.

² Ibid, Sec. 8.

*raiya*ts the Permanent Settlement neither did nor could affect or prejudice in any degree whatever¹. The object of the legislature was to define the conditions under which the Zemindar should be settled with, and not to define the terms upon which he should become absolute proprietor. Little provision was therefore made with regard to the *raiya*ts, and no definition was given of the nature of their holdings. A certain provision was made for the old resident (or *khud kasht*) *raiya*ts. Their existing terms of holding could not be interfered with (except upon proof of fraud in the title), and the right to raise their rents was limited to cases—(a) where the rent paid within the previous three years had fallen below the *nirikkh* or rate of the Pargana, according to the Kanungo's lists, (b) upon a general measurement of the Pargana for the purpose of equalising and correcting the assessment.² With regard to the other *raiya*ts, the Zemindars were declared entitled to "let" the lands "in whatever manner they may think fit," subject to the restriction (among others) that no new cesses are to be imposed.³

The *khud kasht* *raiya*ts then still retained their existing rights, but no doubt they were placed in the most unfavourable situation for enforcing them, having to contend with a Zemindar whose rights had been recognised by the Government, while their own rights had been left to take care of themselves, the right of Government to interfere being limited to specified cases. Sir J. E. Colebrooke speaks of, what he calls, "the melancholy results of the errors of the Permanent Settlement in the Lower Provinces" in these words:—"the errors were two-fold; they consisted, *firstly*, in the sacrifice of what may be denominated the yeomanry, by merging all village rights, whether of property or occupancy, in the all-devouring recognition of the Zemindar's paramount property in the soil; and *secondly*, in the sacrifice of the peasantry by one sweeping enactment, which left the zemindar to make his settlement with them on such terms as he might choose to require."⁴ Its defects.

The safe-guards by which Lord Cornwallis hoped to protect the interests of the *raiya*ts were, briefly put, three in number. The *first* was the injunction on Zemindars to Provisions for protection of *raiya*t.

¹ See Regulation VII of 1799, Sec. 15, Cl. 7—8.

Sir Antony McDonnell's Minute, Paras, II—13: 16—20.

² Regulation VIII of 1793, Secs. 51, 60.

³ *Ibid*, Sec. 52.

⁴ Minute, dated July 12, 1820.

deliver to the tenants *pattas*, (specifying the area of the holding, the conditions of the tenancy, and the rent payable which was never to exceed the established *pargana* rate and the consolidation of demands into one lump sum as rent to prevent the imposition of fresh *abwabs*), subject to the approval of the Collector (to preclude the introduction of new clauses or covenants); the second was the deposit in the Collectorate of the standard of measurement (whereby the areas of holdings might be guaranteed); and the third was the maintenance of the accounts of the raiyats by the village *Patwari*, (whereby the permanency of the rates might be secured).¹ It was intended by these safe-guards to assure to the raiyats the possession of certain area of land on certain specific conditions and at specific rates of rent.²

Neglect
thereof—
dispute
between
zemindar
and raiyat.

But the Zemindars began to evade the tender of *pattas* or tendered them at more than customary rates, and the raiyats refused to accept them. Even when the rates were customary, the *khudkasht* and other raiyats, who claimed a prescriptive right of occupancy, would not, in many cases, take delivery of the *pattas* "under the impression that they would thereby be compromising their rights to unlimited occupancy."³ For the term of the *patta* being limited to ten years, suggested the possible eviction on the expiry of that period. Then there was the fear that the consolidation of all demands into one lump sum in the *patta*, (as prescribed by Section 54 and 55 of Regulation VIII of 1793), would form the basis of a new *asal* or original rent, to which fresh *abwabs* or cesses might be added in course of time. While the raiyat fancies he has a right to retain possession of his lands at a fixed rent, and the Zemindar will not admit this right, it is evident that no rules can be framed which can put a stop to the disputes between the Zemindar and his raiyat. And the newly-established Civil Courts were unable to cope with the great mass of resulting litigation between them. Besides, "since the great famine of 1770, the customary rates of land in Lower Bengal were in excess of the economic rent which could be obtained for it,"⁴ and the acceptance of the *patta* meant the perpetuation of the rather fictitious "*Pargana*" rates. By Regulation IV of 1794, as stated by Dr. Field:—"The Zemindars were enabled to claim any rates they pleased, to distrain for rent at those rates, and to put on the

¹ Regulation VIII of 1793, Secs. 54, 55 and 59.

² McDonell's Minute.

³ Selections from the Records of the East India House, 338.

⁴ Bengal Manuscript Records, 62, Per Hunter.

raiyyat the onus of proving that the rates so claimed were not the established rates."¹ The raiyyats met this oppressive law by the only instrument available to them—the *refusal to pay the rent*. The economic conditions of the country at the time were in their favour and enabled them to defy the landlords, and "those of the resident cultivators who had the most courage or the least fixed property to leave behind, refused to pay the customary rates, quitted their hereditary holdings, and took up land at market-rent as non-resident tenants in some other village."² There was a wholesale withholding of rents, much confusion soon prevailed and many estates were sold, especially in Lower Bengal, for arrears of revenue.

The Zemindars declared they could not pay the revenue unless their hands were strengthened against the recusant raiyyats; and the Government pressed by want of money agreed to strengthen the hands of those on whom it immediately depended for the punctual payment of its revenue.

The notorious *Haptam* or Regulation VII of 1799 was therefore enacted, which gave the landlords practically *unrestricted right of distraint* of all personal property of the raiyyats, and, in certain cases, to *arrest their persons for arrears of rent* without reference to any court. Moreover, with a view to give the landlords greater power still over their tenants, Magistrates were required to punish, by fine or imprisonment, *raiyyats* who could not establish the truthfulness of complaints of hardship made against landlords, or their distraining agents, and the Civil Courts were directed to indemnify *zemindari* officers or others employed in the collections, when improperly summoned; and in case loss of rent or other evident damage should be sustained by the land-holder or farmer in consequence of such wanton and unnecessary summons, on proof thereof, the party injured should be entitled to recover the amount, with all costs of suit from the person who so caused the summons.³

This Regulation was not meant to define or limit the actual "rights of any description of land-holders or tenants, which could properly be ascertained and determined by judicial investigation only, but merely to point out in what manner defaulting tenants might be proceeded against, in the event of their not paying the rents justly due from them, leaving them to recover their rights, if infringed, with full costs and damages, in the established Courts of Justice.

¹ *Landholding and the relation of Landlord and Tenant*.

² Bengal Manuscript Records, 62, *Per Hunter*.

³ McDonell's Minute.

No doubt this law was passed in the *bond fide* belief that tenants were in fault, and that the hands of the land-lord needed strengthening, that his power would be exercised fairly, and that Courts would give relief, if needed. "These last provisions," says Mr. Justice Field, "scarcely required comment. There is scarcely a country in the civilised world in which a landlord is allowed to evict his tenant without having recourse to the regular tribunals; but the Bengal *zemindar* was deliberately told by the Legislature that he was at liberty to oust his tenants if the rents *claimed by him* were in arrear at the end of the year, leaving them to recover their rights, if infringed, by having recourse to those new and untried Courts of Justice the failure in which might be punished with fine or imprisonment."¹ The result of this Regulation, as pointed out by Colebrooke, "was that in twelve years the ancient rights of the *raiya*ts throughout Bengal were on the verge of obliteration."²

Pancham
Regulation—

There was, however, no intention to abrogate the rights of the *raiya*ts by Regulation VII of 1799; and when during Lord Minto I's administration, the evil effects of the Regulation became known, there was a strong revulsion of official feeling, which produced Regulation V of 1812 (the *Pancham*), whereby it was hoped to correct the bad effects of Regulation VII of 1799. With respect to the general right of the landholders to *enhance*, the Regulation provided that no cultivator or tenant of land should be liable to pay an enhanced rent, though subject to the enhancement under the subsisting Regulations, unless *written engagements for such enhancements* had been entered into by the parties or a formal notice had been served on the tenant at the season of the cultivation, *i.e.*, in or before *Jy*l*h*, notifying the specific rent to which he would be subject for the ensuing year. Regarding the realisation of rent by the Zemindar, it *abolished the power of arrest*, but the right of distraint remained. "Under the *Haptam* process the person of the *raiya*t could be seized in default; under the *Pancham* process his property could be distrained; and in either case the proceedings commenced by what has been described as a strong presumption equivalent to a knock-down blow against the *raiya*t."³ And in the course of eighteen years following the Permanent Settlement,

¹ Field's *Landholding*, &c., 581.

² Colebrooke's *Minute*, dated November, 1814—Calcutta Gazette of 25th October, 1893, supplement, 2073.

³ Field's *Landholding*, 665—666.

it was found that the difference between the collections from the cultivators and the amount paid to Government had trebled and the bulk of the increase, in the opinion of revenue experts, consisted of rack-rents and illegal cesses squeezed out of the raiyat.¹

The laws of 1799 and 1812 are so painfully associated in subsequent history with harshness to cultivators, that it is necessary to emphasise the forgotten fact that they were at the time considered *indispensable for the punctual realisation of the Government revenue*. It was argued that, as Government had the right to sell up the estates of the Zemindars for failure to pay the land-revenue, it was necessary to give the Zemindars corresponding powers as regards their raiyats, in the event of the failure of the latter to pay their rents. But it soon came to be realised that the raiyats and their rents could not be treated as on the same footing as the Zemindars and their revenues. Government had fixed the revenue demand in perpetuity, and the accounts of the payment of the revenue were accurately kept in the Collectors' office. Neither of these safe-guards existed in the case of rents of the raiyats. Their necessity.

The effects of both these Regulations were unsatisfactory. Lord Cornwallis' plan of giving *pattas* had failed totally. The refusal of landlords and raiyats to exchange *pattas* and *kabuliats* frustrated the hope that these would serve to fix the rental demand. Nor did the appointment of *Patwaris* secured the desired result of maintaining accurate the accounts of the payments of rents made by the raiyats. The Zemindars were bound by Section 62, Regulation VIII of 1793 to maintain a *Patwari* in every village, who was to be a Government servant, but they gradually converted the *Patwaris* into their own private servants or *gomastas*, and no reliance could be placed on their accounts and papers. Failure of measures taken.

The next step taken was an attempt to create a village agency, which should be independent of both the Zemindar and the raiyat and which should maintain records showing the rights and obligations of landlords and tenants. It was therefore resolved to strengthen and re-organise the indigenous system of *Patwaris* and *Kanungos* as an independent agency for maintaining a record of reciprocal rights of both parties. The reform then embarked on was embodied in Regulation XII of 1817. Attempt to form village agency—Revival of Patwaris.

¹ See *Imperial Gazetteer, Bengal*, Vol. I, 123.

Failure
thereof.

When that Regulation became law, the Board of Revenue proceeded to take action on it by prescribing what the duties of the *Patwaris* should be. It soon, however, became apparent that as an engine for the protection of the tenant, by bringing on record and maintaining the established rates and rules by which rents were to be regulated and the accounts of the payments of rents made by the raiyats, Regulation XII of 1817 was as useless as the provisions of Regulation VIII of 1793 had been. Things have now advanced to this stage. The failure of Lord Cornwallis' method of record of rights by means of *pattas* has been recognised; the failure of the Patwari Regulation XII of 1817 was being fast admitted.¹

Proposal for
record of
rights—not
carried out.

The failure of all the attempts made to control agrarian relations led the Court of Directors in 1824 to sanction a *proposal to make a survey and record of rights* of the permanently-settled districts of Bengal, as being the only means of defining and maintaining the rights of raiyats. The design was not however carried out, and while the correspondence relating to it was proceeding, fresh legislation which proved *injurious to the raiyats was undertaken*. This was the provision in the Revenue Sale Law for the clear title that the purchaser at a sale for arrears of revenue would get, that is, a *title free of incumbrance* created by the defaulter or his predecessor, being representative of the original engager. We proceed to discuss the injurious effects of the Revenue Sale Laws on the rights of the raiyats in the next chapter.

Fresh
legislation
injurious to
raiya.

¹ McDonnell's Minutes, Paras. 16-20.

CHAPTER III.

THE SUPPRESSION OF OCCUPANCY RIGHT.

—Effect of the Revenue Sale Laws.

It has been already stated that one of the conditions on which the Zemindars were made proprietors by the Permanent Settlement was, that the Government revenue assessed upon their estates should be punctually paid and that in default of such payment "a sale of the whole of the lands of the defaulter or such portion of them as would be sufficient to make good the arrear, would positively and invariably take place." ¹ If the proprietor of an estate reduced his own receipts by granting leases to tenure-holders and raiyats, the very probable consequence was that he would be unable to pay his own revenue, and his estate would in consequence come to sale. To prevent this it was thought well to provide that when an estate was sold for arrears of its own revenue, all incumbrances should be avoided, all leases cancelled, and the estate handed over to the new proprietor in the same condition in which it was at the time of the Permanent Settlement. ²

Principle of
Revenue
Sale Law.

It was accordingly enacted by Section 5 of Regulation XLIV of 1793 that upon a sale for arrears of revenue, all engagements with dependent *taluqdars*, all leases to underfarmers, and *pattas* to *raiya*ts, should stand cancelled from the day of the sale, and the purchaser should be at liberty to collect from the dependent *taluqdars* and *raiya*ts, whatever the former proprietor would have been entitled to demand, according to the established usages and rates of the *pargana* or district, had the cancelled engagements never existed. According to the construction put upon the section by the Privy Council, the engagements, leases, and *pattas* did not become *ipso facto* void upon the sale taking place, but the *taluqdars* and *raiya*ts remained in all respects as before, except that they became *liable to a certain limited increase of rent* "according to the established usages and rates of the *pargana* or district"—and that only in cases where grants had been made with reservations of rent below those usages and rates. ³

Avoidance of
leases and
pattas—Reg.
XLIV of
1793.

Liability of
*raiya*t to pay
enhanced
rent
Regulation V
of 1872.

¹ Regulation VIII of 1793.

² Field's *Landholding*, 598.

³ *Purnomayi v Patish*—10 M. I. A. 123.

Where no
established
pargana
rate. Reg V
of 1812.

It was soon found that there were reasons to believe that the *pargana* rates referred to above had in many cases become very *uncertain*, leading to oppression and rack-renting of the raiyats by the auction-purchaser, and the next Regulation V of 1812 provided that when any known established *pargana* rates existed, they should determine the amount of rent to be received by the purchasers, and where no such established *pargana* rates were known, *pattas* were to be granted and the collections made according to the rate payable for lands of a similar description in the places adjacent, and in cases of the cancellation of the *pattas*, new *pattas* were to be granted and collections made, at rates not exceeding the highest rate paid for the same land in any one year within three years next preceding the period at which they were cancelled.

All round
Enhancement

When we remember the quantity of waste land in Bengal at the time of the Permanent Settlement and the power which Zemindars had (according to law) of letting this land on what conditions they pleased, it will be evident that in very many cases the rate payable in the first case was a high rate, and any reference to this standard was certain to involve *enhancement*, and the provision in the second case had also an enhancing tendency by bringing rent generally up to the highest point reached in a single occasion.

Ejection
only in case
of refusal to
pay—Reg.
VII of 1799.

Regulation IV of 1793 contained no provision for cases where the dependent *taluqdars* and raiyats refused to pay the enhanced rent. This was subsequently provided for by Section 29 Clause 5 of Regulation VII of 1799, which empowered the purchaser "without any previous application to the *adalat* or court to *eject* them".

Ejection in
every case
not exempted
—Reg. XI of
1822.

It is admitted on all hands that up to the year 1822 no raiyat could be dispossessed at the will of the auction-purchaser. He was, at most, liable to pay the full *pargana* rate, and could only be ejected after refusal to pay the enhanced rent. In that year, a Sale Law, Regulation XI of 1822 was passed which remained in force until 1842, and by virtue of it the auction-purchaser could, at his option wholly avoid any tenure, unless it fell within the class contemplated in Section 32 of the Regulation.¹ It however protected from ejection, on the sale of an estate for arrears of revenue, "*Khud kasht qadimi* raiyats or resident and hereditary cultivators having a prescriptive right of

¹ Okinealy's Note, Gazette, 469—470.

occupancy," and the purchaser was not to demand a higher rate of rent from such a tenant than was receivable by his predecessor, unless in specified cases when a rent lower than was justly demandable had been fixed by him.¹ Similar provision had already been made in the Putni Sale Law.²

When Regulation XI of 1822 was passed the use in Section 32 of that law of the term "*khud kasht quadimi raiyat*, or resident and hereditary raiyat, with a prescriptive right of occupancy", to designate the cultivator who would not be liable to eviction on a sale for arrears of revenue, gave rise to the doctrine that *khud kasht* raiyats, who had their origin subsequent to the Settlement were liable to eviction, though if not evicted, they, under Section 33, could only be called upon to pay rents, determined according to the law and usage of the country; and also that the possession of all raiyats whose title commenced subsequent to the Settlement was simply a *permissible* one, that is, one retained with the consent of the landlord. It follows that the law distinctly gave the purchaser the power to eject a *khud kasht* raiyat whose tenure was created after the Permanent Settlement, and if he was not ejected he was liable to be assessed at the discretion of the landlord. The word '*discretion*' entirely annihilated the right of the *khud kasht* tenants created subsequent to the Settlement in estates sold under these laws. It reduced them from tenants with rights of occupancy, so long as they paid the established rate of the *Pargana*, or the rate which similar lands paid in the places adjacent, into mere tenants-at-will of the Zemindar, who might any year eject them and place in their stead any tenant competing for the land.³ Besides, the establishment of this principle practically left the Zemindars free to enhance the rents of all but a small class of raiyats up to any point that competition would raise them; because, though the provisions of the Regulation applied directly to those estates only which had been sold for arrears, yet the principle once established, was soon extended by the power of the Zemindars to other estates also. Quite apart from this power, the raising of rents in one place tended to create higher prevailing rate which could by law be imposed on tenants of estates which had been the subject of a revenue sale.⁴

Distinction between *khud kasht* before and after Permanent Settlement.

Letter reduced to tenants-at-will liable to enhancement.

¹ Regulation VIII of 1793, Sec. 11 Cl.3.

² The Great Rent Case—B. L. R. F. B. 287 (Per Trevor J.)

³ Field's Land holding, &c. 2nd Ed, 665.

Act XI of
1841.

The regulation of 1822 remained in force for nineteen years, namely until 1841, when it was repealed by Act XI of that year, which empowered the auction-purchaser to enhance at discretion (anything in the existing Regulations to the contrary notwithstanding) the rents of all under-tenures in the estate and to eject all tenants thereof, except (among others) *khud kasht* or *kadimi raiyats* having rights of occupancy at fixed rents or rents assessable according to fixed rules under the Regulations in force. The power to enhance at discretion the rents of all tenants other than those falling within these exceptions given by the Act to auction-purchasers afforded them the amplest power of exacting rack-rents from the raiyats.¹

Act I of 1845.

Act XI of 1841 was repealed by Act I of 1845 which reproduced *verbatim* the above provisions. This latter Act remained in force for fourteen years until it was repealed in 1859 by Act XI of that year.

Act XI of
1859. Raiyat
saved from
ejectment.

The power to eject which continued under Act I of 1845 was taken away by Act X of 1859. It provided that the auction-purchaser shall *not* be *entitled to eject* any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the law in force, or to *enhance the rent* of any such raiyat, otherwise than in the manner prescribed by any such laws or otherwise than the former proprietor, irrespectively of all engagements made since the time of the Settlement, may have been entitled to do. From that time the auction-purchaser under Act I of 1845 or Act XI of 1859 could only enhance, but not eject an occupancy tenant save after decree.

Evil effects
of Revenue
Sale Laws.

The connection of the Sale Law with the tenants' rights was important when sales were frequent. The whole body of the tenants was alarmed. As there was no means of making the defaulter hand over his papers to the purchaser, the latter came in as a stranger, not knowing one tenant from another, not the protected class from the unprotected. There being no record of the *protected* he assumes that none are protected, while the tenants set up groundless claims to protection, often-times supported by the late Zemindar. "From the account given of the Revenue Sale Law", writes Mr. Justice Field, "it will appear that it placed them (the auction-purchaser) in a position of abnormal superiority detrimental to the rights and interests of the raiyats. The insecurity of tenure, the mischievous power

of annoyance, interference and extortion, which these laws have given to the auction-purchaser, have been fatal obstacles to agricultural improvement and have proved at once the source and the instrument of oppression and wrong. Affrays and litigation cannot but ensue and, in the language of Sir H. Ricketts, "to the tenants of an estate a sale is as the spring of a wild beast into the fold, as the bursting of a shell in the square. It is the disturbance of all they had supposed to be stable. The consequence must be a re-casting of their lot in life with the odds greatly against them."¹

Thus the period that followed the Permanent Settlement and preceded the legislation of 1859 is characterised by an anxious effort on the part of the Government to secure its own land revenue. While strigent rules were enforced for the realisation of arrear of Government revenue against the Zemindar, great facilities were offered to the auction-purchasers at a revenue sale to avoid incumbrances. Self-interest or severity of assessment led to numerous sales of estate after the Permanent Settlement and nine-tenths of the estate were sold. The operation of these Sale-laws was more or less destructive of subordinate interests, and the proprietary right conferred on the Zemindar by the Permanent Settlement gradually grew into an *estate* in the legal sense of the term of much greater dimensions than the English fee simple. Not only were all other estates ignored to create it but by the device of the Sale-law as often as Government revenue was not paid, all subordinate interests created since the Permanent Settlement are annihilated, and the higher estate handed over to its new possessor free of incumbrances,² and it is no exaggeration to say that within fifty years that immediately followed the Permanent Settlement a complete revolution took place in the constitution and ownership of the estates which formed subject of that Settlement.

But the evil effects of the Sale Laws have yet to be told. It was laid down by the Regulation of the Permanent Settlement that on failure of payment of Government revenue punctually within a certain date from whatever cause "a sale of the whole of the lands of the defaulter or such portions of them as may be sufficient to make good the arrear will positively and invariably take place."³ But it was soon found to be impossible for "the ancient zemindars of Bengal, encumbered as they were with all

Destructive
of raiyats'
rights.

Extinction of
Mū-Bāp Ze-
mindars—its
effect on
raiya.

¹ Field's *Landholding* 669—670: The contrary view expressed by Okinealy does not seem to have any historical basis.

² Ray's Introduction to B. T. Act.

³ Regulation I of 1793, Section 7.

the costly paraphernalia of their petty courts and military retainers.”¹ to suddenly transform themselves into punctual tax-collectors. Besides, the revenue assessed was by no means light, and its burden pressed very heavily on the zemindars at the time, when the country had hardly recovered from the effects of a widespread famine which desolated it in 1770. During the two years 1796—97 and 1797-98 estates bearing a revenue of more than a fifth of the whole land-tax of the province, were advertised for sale for arrears.² Among the defaulters were some of the oldest and the most respectable families in the country, such as the Rajas of Nadia, Rajshahi, Bishnupur, Kasijora and others, the dismemberment of whose estates, at the end of each succeeding year, threatened them with poverty and ruin.³ To quote the expressive language of Dr. Hunter,—“the wave of the Permanent Settlement had in truth submerged the ancient Houses of Bengal.”⁴ Thus within a few years of the Permanent Settlement the whole class of the ancient zemindars of Bengal, who had really been looked upon by the tenants as their *Mā-Bāp* and whom they had always approached in their weal or woe, became extinct, and their places were taken by a class of people who were really upstarts grown rich by taking advantage of the confusion of the time. These people, armed as they were by law with very large powers to cancel all engagements entered into by former landlords with the raiyats on the estates purchased by them, were most relentless in their demands. There can be little doubt that no feeling of moderation on the part of the purchasers restrained them from using to the utmost the facilities which the Legislature had placed at their disposal, for exacting the highest rent that could be wrung from the cultivators. They bought the estates as a speculative investment, and expected to make the most of their bargain. They had not the social position of the proprietors and made no pretence to the feelings of the proprietors to their tenants and made the best of the opportunity they were afforded of realising extortionate rents.

¹ Hunters's *Introduction to Bengal Records*, 100

² *Zemindars of Bengal* (Anonymus) Vol. I. App. XII.

³ Fifth Report, Vol. I. 71.

⁴ See 2 above.

CHAPTER IV.

THE SUPPRESSION OF OCCUPANCY RIGHT.

—Effect of Sub-infeudation.

One of the effects of the Permanent Settlement was *subinfeudation*, that it gave an enormous impetus to the system of *subinfeudation*, which proved extremely injurious to the rights of the raiyats. As Sir George Campbell observes:—"At the Permanent Settlement Government, by abdicating its position as exclusive possessor of the soil and contenting itself with a permanent rent-charge on the land, escaped thenceforward from all the labour and risks attendant upon detailed maffassil management. The zemindars were not slow to follow the example set them and immediately began to dispose of their zemindaries in a similar manner, more especially as the system afforded them the only means of escape from the ruin threatened by the high assessment of land revenue made at the time of the Permanent Settlement."¹ The climate and habits of the country also suggested that the proprietors should save themselves the trouble by *sub-letting their estates* in that way to anyone who would give them the largest profit over and above their revenue payment.² And permanent tenures, known as the *Patni Taluqs*, were created by them in large numbers, and extensive tracts were leased out permanently. These *talugdars* were made proprietors in the same way as the Government had made the Zemindars proprietors, and by the year 1819 it had been so extensively effected that it was formally legalised by Regulation VIII of that year, and means were afforded to the Zemindars of recovering arrears of rent from their *putnidars* almost identical with those by which the demands of Government were enforced against themselves. The effect of the sale of a *patni taluq* was made similar to that of a revenue-paying estate, in as much as all leases granted and incumbrances created by the defaulting tenant were voidable by the purchaser, who was entitled to take the *taluq* in the condition in which it was upon its original creation. As the proprietors' lessees in time grew rich, what with freedom from war and security and daily increasing value of land, so they too sublet their interests on precisely similar terms

¹ Cobden Club Essay.

to other persons, who, on taking such leases, went by the name of *Darpatnidars*. These again sometimes similarly underlet to *Sepatnilars*—"and subletting was in very many instances continued several degrees lower, and in some places there are as many as a dozen gradations between the zemindar at the top and the cultivator of the soil at the bottom."¹

Its disastrous
effect on
raiya.

The subletting system, relieves the zemindars from all connexion with their estates or raiyats and places these *en masse* in the hands of middlemen and speculators, who, like the purchasers at the revenue sale, as stated by Dr. Hunter:—"had not the social position of the proprietors and made no pretence to the feelings of the proprietors to their tenants".² "who speculate upon the opportunity they may be enabled to command of realising extortionate rents." Thus tenure within tenure became the order of the day, each resembling a screw upon a screw, the last coming down with the pressure of them of all upon the tenants.³ The effect of the sale of a Putni or similar tenures for arrears of rent had also the most disastrous effects on the rights of the raiyats. It is easy to conceive how the new landlords—auction-purchasers abused the extraordinary powers with which the Legislature invested them and ground down the toiling millions of the country and paralysed the efficient operations of those with whose prosperity the prosperity of the entire country is identified.

¹ Baden Powell's *Land systems in British India*, 407.

² Hunter's *Introduction to Bengal Records*.

CHAPTER V.

THE SUPPRESSION OF OCCUPANCY RIGHT.

—*Effect of changes in economic conditions.*

We must also take note of the changes in the economic conditions of the country that pressed very heavily on the occupancy raiyat. In 1770, immediately after the acquisition of the *Dewany* by the East India Company (in 1765), the whole of the province of Bengal was devastated by a severe famine, the like of which was unknown in the annals of the country. Its magnitude and extent can be best realised by considering that it is still popularly remembered as a *manvantara* or one of those periodic catastrophies that overtake the world in the course of its evolution. It swept away a third of the inhabitants of Bengal and reduced the number of its cultivators much below what was required for the cultivation of the village lands. When the Permanent Settlement was concluded in 1793, a large proportion, estimated by Lord Cornwallis at one-third, at one-half by others, and by some at two-thirds, of the land capable of cultivation was waste and probably was never otherwise.¹ And as Francis, the notorious opponent of Warren Hastings, wrote in 1776 :—“Where so much land lies waste and so few hands are left for cultivation, *the peasant must be courted to undertake it.*”²

The zemindar was thus forced to court the tenant by offering unoccupied or deserted lands at rents lower than the established rate levied from the resident cultivators. There were the class, described by Warren Hastings as the “*vagrant raiyats*,” (whom we have already known as the *pai kasht*, raiyats), who “have it in their power to make their own terms with the zemindars. They take land at an under-rent and hold it for one season. The zemindar then increases their rent or exacts more from them than their agreement, and the raiyats either desert or if they continue, they hold land at a lower rent than the established rates of the country. Thus the *ancient and industrious tenants are obliged to submit to undue exactions while the vagrant raiyats enjoy land at half price.*”³ And the consequence was that those

Famine of 1770.

Competition of landlords for tenants.

Situation more favourable to *paikashts* than to *khudkashts*.

¹ Fifth Report, Vol. I, 591.

² Hunter *Introduction to Bengal Records*, 60.

³ Minute, dated 12th November, 1776.

Khudkashts
reduced to
paikasht.

Compulsory
reduction of
customary
rent.

Change of
situation.

Competition
of tenants
for land.

Customary
rent
enhanced by
competition.

Agricultural
depression.

of the resident cultivators who had most courage or least fixed property to leave behind, refused to pay the customary rates, quitted their hereditary holdings, and took up land at the market rent as non-resident tenants in some other village.¹ Thus the presence of these vagrant raiyats in almost in every village tended to *reduce the customary rates of rent*. The pressure of these economic conditions soon gave the vagrant raiyats a recognised position in the village.

But there were other circumstances at work which soon changed these economic conditions that gave the raiyats the position of vantage that they had so long enjoyed over the landlords. The era of peace and settled government inaugurated by the British Rule soon helped the country to re-coup the loss in its population caused by the great famine of 1770, and the rapid increase of population revolutionised the relation of labour to land. *In 1770 the landlords were competing for the tenants*; in 1819 the tables were turned and the *tenants were seeking for lands* to cultivate for their sustenance. The effect of this competition among raiyats for lands was that it afforded the zemindar an opportunity for *raising the rate of rent*. Besides, as we have already stated, The Permanent Settlement Regulations which left the zemindars practically unfettered to enhance the rent of the raiyats, and the *Haptam* and other cognate Regulations which armed them with large power for realising the rents, enabled them to dictate their own terms to the tenants. To add to this, the successive Revenue Sale Laws, by the operation of which half the revenue-paying estates changed hands between 1793 and 1815 and which enabled the auction-purchasers to avoid all previous engagements with the raiyats, had, as we have already seen, a disastrous effect on their rights. By these means the landlords were able to secure an addition to their rent-roll, which represented at least four times the assets as they stood in 1793, between the years 1810 and 1860, and Dr. Hunter points out that "almost at the very time that the *bludgen law* of 1812 was passed against the tenant, the increase in the yield of estates since 1793 was officially estimated at 36 per cent."² The agricultural depression thus brought about was so acute that according to some it became standing menace to peace and order. And as Dr. Hunter observes :—"the result would have been much more disastrous to the raiyats but for certain counter-acting influences which were at work."¹ At this

¹ Hunter in *Bengal Manuscript Records*, 62.

² *Ibid* Colebrooke's *Minutes* in the Selection of the Records at the East India House.

juncture Government felt that in the interests of the agricultural people it was imperative that the settlement of rent between the landlord and the tenant could no longer be safely left to the uncontrolled influence of competition, and Government intervened by laying down certain principles according which — Act X of 1859. the rent payable was to be regulated. This was done in Act X of 1859 which we now proceed to discuss.

CHAPTER VI.

A RETROSPECT.

It is necessary now to take a retrospect of the legislative measures which the revenue policy of Government dictated for the protection of its revenue and the injurious effects they produced on the rights of the raiyats, in order to trace the subsequent history of the tenant right. Dr. Field has thus recapitulated the same:—"I have shewn that the mutual rights of the zemindars and the raiyats were in confusion and uncertainty, when the East India Company acquired the *Dewany* in 1765—that between 1765 and 1793 no effectual steps were taken to ascertain define, and adjust those rights—that Mr. Hastings and Mr. Shore, whose experience of the subject should have given weight to their sentiments, were of opinion that before any permanent settlement was made with the zemindars, those rights should be defined and adjusted—that Lord Cornwallis and the Court of Directors, putting aside the advice of Indian experience, deliberately refrained from any such definition or adjustment—that they, under the influence of English ideas believed, honestly though mistakenly, that *zemindars* and *raiya*ts would adjust their mutual relations by contract among themselves, and relied upon the *Patta Regulations* to bring about the result—that the *Patta Regulations* not only failed for this purpose, but were utilised by the *zemindars* for the oppression of the raiyats and the destruction of their rights—that in 1799, when the government revenue was threatened by the failure of the system of 1793, the zemindars were placed by abnormal legislation in a position of superiority and power over the *raiya*ts, fatal to all ideas of freedom of contract and liberty of action—that at the same time the delusive idea of proving their rights in the Courts of Justice was put before the *raiya*ts—that this idea was delusive for many reasons, and especially for the reason that the same government which invited them to prove their rights, had unwittingly destroyed the only records and practically the only evidence, of those rights—that fresh legislation undertaken in 1812 with the intention of benefitting the *raiya*ts, proved ineffectual, and served to strengthen the position of the zemindars—that in 1819 a system was sanctioned by the Legislature, which had the effect of creating middlemen and forcing

still lower the condition of the cultivators—that in 1822 legislation inaugurated in the interests of purchasers at Revenue sales, had the effect of further destroying the rights of the raiyats—that at this very time, the Government of the Bengal Presidency and the Court of Directors were fully aware of the mischief that had been done and were most anxious to remedy it—that these excellent intentions were never effectuated—that in 1845 further legislation in the interest of the revenue purchasers further prejudiced the interest of the tenants and destroyed all security of tenure—that the zemindar's right to enhance rents, fortified and encouraged to unnatural activity by abnormal legislation in favour of the landlords and revenue-purchasers, took every advantage of an increasing population, and the liberty of letting waste and unoccupied lands on the zemindar's own terms, in order to push up the rents to the highest rates that the tiller of the soil could pay and live—and that as a result of the treatment of the peasantry the province had been brought to a miserable condition of destitution and wretchedness.”¹

Landholding, 503 : 822.

CHAPTER VII.

THE REVIVAL OF OCCUPANCY RIGHT.

—*Effect of Rent Act of 1859.*

The result of their study of land tenures was to convince the Government officials that there were below the zemindars tenants, who had undeniable rights, to the soil and that these rights had been overlooked in the Permanent Settlement which was made with the land-holders in Bengal. With this realization it became clear that no settlement could be made in perpetuity which did not give legal recognition to these rights. As it was impossible to attempt legislation until Government was in possession of detailed information respecting the various forms of tenure actually recognised in the country, it was decided to prepare a '*record of rights*' in every village or estate before settling the land-revenue which it was to pay. This decision was embodied in Regulation VII of 1822. Thus for the temporarily-settled areas it provided that all future settlements of the land-revenue should be preceded by a record of "the rights and obligations of various classes and persons possessing an interest in the land or in the rent or produce thereof." And this course was followed in the resumption to revenue of lands held revenue-free on invalid titles. The work done in connection with these resumption proceedings between 1830 and 1850 supplied Government for the first time with a really detailed account of the rights and obligations of the different classes of landlords and tenants. The first fruits were seen in Act XI of 1841 which protected from ejection on the sale of an estate for arrears of revenue, all *khul kasht* and *kadimi* raiyats having rights of occupancy at fixed rents or at rents assessable according to fixed rules under the Regulations in force. This was an important recognition of the need for protection of the occupancy rights of the raiyats, and of the classes who were entitled to enjoy such rights. But no legal definitions of occupancy rights and occupancy raiyats were forthcoming until Act X of 1859. Act XI of 1841 was repealed by Act I of 1845, which however re-enacted the above provision *verbatim*. Act XI of 1859, which repealed the latter Act, contained very similar provisions. But with regard to the other raiyats this power to eject continued under Act XI of 1841, which provided that a sale should void all tenancies and tenures

Recognition
of occupancy
raiya's right.

Reg. VII of
1822.

Act XI of
1841.

Act I of
1845.

Act XI of
1859.
Of other
raiya's.
Act XI of
1155.

created since the Settlement, and leave all tenants to be enhanced at discretion, except certain specified cases, which were made more definite than before, and under Act I of 1845 (which repealed the former) by which the purchaser (of an estate at revenue sale) was entitled to eject all under-tenants with certain exceptions, amongst which were *khud kasht kadimi* but not simply *khud kasht* raiyats. (of Act I of 1845.)

With the introduction of Act X of 1859 dawned a new era in the history of the tenants in Bengal. By it the Government redeemed the pledge of protecting the raiyats that was given in the Proclamation of the Permanent Settlement. The main object of the Act originally was "to amend the law relating to the recovery of rent." But during the passage of the Bill through the Council important additions were made with the result that the Act as passed contained a more or less exact definition of the different classes of raiyats and of the rights which it was thought expedient to confer on them. Introduction of Act X of 1859.

The Act divided the raiyats into three classes :—

(a) Those who had held at rates of rent which had not been changed since the Permanent Settlement were declared entitled to hold for ever at these rates. If the rate of rent had not been changed for twenty years, it was to be presumed that it had not been changed since the Permanent Settlement; (b) Every raiyat who had cultivated or held land for twelve years was declared to have a right of occupancy in the land, so long as he paid the rent payable on account of the same. But this rule did not apply to proprietor's private land let out on lease for a term of years or from year to year, and the accrual of occupancy rights in any land could also be barred by a written contract; (c) Other raiyat, not having rights of occupancy, were declared entitled to *pattas* only at such rates as might be agreed upon between them and their landlords. The Act thus introduced a new classification of the agricultural population in Bengal. The *khud kasht* raiyats fell within either the first or the second class indicated above, but a few, who might acquire such a status in recent years, would not get the benefit of it until after the lapse of twelve years, while the *pai-kasht* raiyats had most of them been considerably raised in status. The Act contained further important provisions for the protection of occupancy raiyats. Their rents could only be enhanced on certain specified grounds; they could only be ejected by a judicial decree or order, and their crops could only be distrained for the arrears of one year.

Classification of raiyats in the Act.

Doubt as to
raiayats'
right and
mode of
acquiring it.

At the time of the passing of Act X of 1859 the state of things was thus: the tenures and rents of the raiyats were, still for the most part, regulated by the old custom of former times. But two things required legal definition:—*first*—there was doubt as to the mode or prescription by which a *khud kasht* or occupancy tenure was acquired, and which tenures were of this character: *second*—there was an entire want of any regulated or defined mode of enhancing the customary money rate.¹

Khua Khast
before and
after
Settlement.

With regard to the *first*, it seems that these *raiayats* were practically and legally, though not by express statute, divided into two classes—the *khud kasht kadini* or the resident hereditary cultivators who had been in possession of the land from before the Settlement, and the simply *khud kasht* or those whose possession did not run back so long. While no doubt existed as to the right of those raiyats, who from generation to generation had cultivated the lands of the village in which they resided for a period antecedent to the Permanent Settlement and who without doubt were entitled to be called and classed with the *khud kasht* raiyats, the greatest doubt existed as to whether any other class or description of raiyats were entitled to be called *khud kasht* raiyats. Are *khud kasht* raiyats as spoken of in the Regulations, those and exclusively those who were *khud kashts at the time of the Permanent Settlement*, or does the term *khud kasht* embrace also those raiyats who, since the time of the Permanent Settlement had, by a long residence in the village in which they held and cultivated land, acquired a prescriptive right of occupancy? Certainly, the old Regulations seem to point to other than those undoubted *khud kasht* raiyats whom the Permanent Settlement found upon the land; but what length of holding constituted a right of prescription had never been definitely or inflexibly laid down.² It was not certain whether *mere settlement in the village* on the ordinary terms without limitation of tenure, gave such a right or what length of prescription established that right. The various Sale Laws had also introduced a large element of confusion—different estates being variously affected according to the date of sale. And, what is perhaps the most important of all, owing to the absence of public records in Bengal, the perishable nature of private evidence, and the discredit attaching to private documents and oral evidence in this country, it was very difficult to prove whether a

¹ The Great Rent Case—B. L. R., F. B. 257 per Campbell J.

² Ibid Per Steer J.

raiyat's holding was really ancient, or what was the date of its creation. The oldest holdings were thus imperilled by the absence of reliable proof.¹ Thus it was quite certain that all the old village cultivators at the time of the Settlement were—if in the lapse of ages they had lost actual proprietary rights—certainly entitled to be considered as "*ex-proprietary*" in some sense. Yet it was not all of these that could get the protection given to *khud kasht kadimi* raiyats; and even if they could, there were many tenants of less pretensions, who were still in the belief and feeling of the people, entitled to occupancy rights. In the sixty years that had elapsed since the Settlement, a number of such rights had grown up, and tenancies had been held from father to son. But in Bengal and the North-Western Provinces (now the United Provinces) the history of the resident tenants was so obscure that it was impossible to say definitely what were the facts of the tenure so as to place any tenant in this class or in that².

The Gordian knot was, therefore, cut rather than untied by enacting (in Act X of 1859) the rule that any tenant who has *continuously occupied land in the village for twelve years* is an occupancy tenant.¹ The fixing of twelve years or any other arithmetical rule of limitation was no more than an equitable expedient for putting an end to strife and saving rights, which were in danger of being lost through failure of technical proof. Such a rule of law is needed only when there has been a grant of one class of rights without definition of the others (as was done by the Permanent Settlement). Then the only remedy is—when the lapse of time and circumstances of the country render discrimination difficult, if not impossible—to grant a general right of tenant-occupancy, based on a continuous holding for a fixed number of years, as a practically just, if arbitrary, method of protection. Thus in Bengal in every permanently settled estate, the Zemindar's right was, as we have seen, clearly an adventitious thing—one which had grown up over that of the original village land-holders, but the result of the Permanent Settlement was to sweep into one common grade of tenant, the bulk of the soil-holders under the superior landlord. There had been a grant of one class of rights—the proprietary rights to the Zemindars without definition of the others—the rights of the tenants, and the lapse of time and the circumstances of the country rendered discrimination difficult, if not impossible. But the great

Twelve years
occupation
sufficient for
protection.

¹ Ibid *Per Cambell J.*

² Baden Powell's *Land Systems in British India*, Vol. I.

bulk of the village cultivators were no doubt equitably entitled to a permanent position. To grant therefore a general right of tenant occupancy, based on a continuous holding for a fixed number of years, was a practically just, if arbitrary, method of protection of rights which were in danger of being lost through failure of proof. Such was also the case in the North-Western Provinces. In other provinces where the history was different, the existence of the natural classes of privileged tenants was so clear, and the claims of the present proprietary body were so far stronger, that there was no occasion for any further general provision. In these provinces a number of privileged landholders were recognised as sub-proprietors of holdings. And when this class was provided for there was less difficulty in restricting the occupancy tenant right without recourse to any broad artificial rule.¹ Sir Henry Maine observes :—"There was too much around the earliest Anglo-Indian observers which seemed inconsistent with (to say the least) the universal occurrence in India of the English relation between landlord and tenant-at-will, for them to assume unhesitatingly that the absolute ownership of the soil was vested in some one class, and that the rest of the cultivating community were simply connected with the proprietary class by paying for the use of land whatever the members of that class saw fit to demand. They did assume that the persons who were acknowledged to be entitled to have the highest rights in the soil, whether within the community or without it, bore a close analogy to English land-owners in fee simple. They further, took for granted that the great mass of the cultivators were tenants-at-will of the English pattern; but they gave effect to their doubts of the correctness of those analogies by creating *between land-owner and tenants-at-will an intermediate class of protected*, or, as they are called in the East, *'occupancy tenants.'*"⁴

Abandonment of element of residence.—
Its reason.

Two elements went to make up a *khud-kasht* raiyat who was entitled to protection :—(a) *residence* in the village, and (b) *occupation* of land forming part of the village. But the Legislators of 1859 *abandoned the element of residence and adopted a prescriptive test* in determining the rights of the *khud-kasht*. As pointed out by Sir Henry Maine :—"When, under the Government dispossessed by the British, any cultivator was shewn to have *held his land by himself or his ancestors for a certain space of time*, he was declared

¹. Baden Powells' *Land systems in British India* Vol. I, Do.
Land Revenue in British India.

². Maine's *Village Communities.*

to be entitled to a qualified protection against eviction and rack-rent. But at first the rule, of which the origin is uncertain, was probably intended as a rough way of determining a class which in some sense or other was included within the village-community."¹ Besides, both by the Hindu and Mahomedan Law, as well as by the legal practice of the country, *twelve years* had been considered sufficient to establish a right by negative prescription, that is, in the absence of any claim on the part of other persons during that period; and this had probably some influence in determining the period chosen. And hence the doctrine which has obtained that *khud-kasht* raiyats in possession for twelve years before the Settlement were under no circumstances, not even on a sale for arrears of revenue, liable either to enhancement of rent, or eviction from their holdings, so long as they paid the rents which they had all along paid.² With regard to this the Select Committee (for the Rent Act) observed:—"The laws in force speak of '*khud-kasht* raiyats' as possessing rights of occupancy and in some places the word '*khud-kasht*' seems to be considered as synonymous with '*resident*' * * * But it has been pointed out by the Western Board that residency is not always a condition of occupancy; and it appears that, after much enquiry it was prescribed by an order of the Government of the North-Western Provinces in 1856, as most consistent with the existing practice and recognised rights that a *holding of the same land for twelve years* should be considered to give a right of occupancy. We have followed this precedent."³ Thus was solved one of the two problems which required solution at the time of passing Act X of 1859, *viz* whether prescription or residence in the village should constitute a *khud-kasht* raiyat. The Act provided that:—"Every raiyat, who shall have cultivated or held land for a period of twelve years, shall have a right of occupancy in the lands so cultivated or held by him, whether it be held under *patta* or not, so long as he pays the rent payable on account of the same."⁴

Thus by Act X of 1859 a new species of right, called *occupancy right*, was conferred upon cultivators who had occupied their holdings for twelve years and upwards. Hence it has been observed that the occupancy raiyat is

Twelve years occupancy right how far creation of Act X.

¹. Maine's *Village Communities*.

². The *Great Rent Case*, B.L.R., F.B. 214—215, Per Trevor, J.

³. Report of Select Committee.

⁴. Act X of 1859, § 6.

a creation of Act X of 1859. It has, however, substantially restored the *khud kasht* raiyat to his former position. For, as has already been pointed out, probably in Hindu and Mahomedan times, a raiyat, who had cultivated the same holding for twelve years would have been considered to have given pledges required by the community for protection against ouster. As observed by Mr. Justice Field:—"In the case of *khud kasht* raiyats the Legislature, in giving a right of occupancy merely followed custom, the particular period of twelve years being borrowed from the law of limitation."¹

Right conferred on *pai kashts* as well. Act X has besides extended the privileges of the *khud kashts* to the *pai kasht* raiyats holding for twelve years. The old distinction of the raiyats into *khud kashts* and *pai kashts* now disappears, and for it we have the broad division of the raiyats into those having right of occupancy, and those not having such a right, or in other words into 'occupancy' and 'non-occupancy' raiyats. Possession and cultivation of land, and payment of rent were all that was now necessary to confer on the raiyat this right of occupancy. Residence in the village in which he held land, or his recognition as a member of the village community, would not improve or affect this statutory right in relation to the landholder, except perhaps in matters of enhancement or abatement of rent. A non-resident or an alien to the community of the village might thus have, in the eye of the law as laid down in 1859, almost the same privileges and immunities as the *khud kasht* raiyat. He might still be a *pai kasht* raiyat, but if he could fulfil the conditions laid down in Section 6 of the Act, he would cease to be a tenant holding at the pleasure of the landlord, liable to be ejected at the end of the agricultural year, and he would not be bound to pay rent at the rate which the landlord might dictate. The protecting hand of the legislature created a right for the mass of the agricultural population which raised them from the precarious position into which they had been reduced on account of the want of any definite rules for the guidance of Courts of Justice. The direct effect of the twelve years' rule thus declared by the Legislature was, that a large number of tenants, who before the Act were mere tenants-at-will and so liable to be rack-rented, at once acquired a protected tenure.² Thus while ignoring the special privileges of *khud kasht* raiyats and the existence of all rights depending upon custom, it conferred

¹ Field's *Introduction to Regulation 40*, Foot note 4.

² Field's *Landholding*, 764.

the same benefit upon *khud kasht* raiyats who admittedly had privileges, and *pai kasht* raiyats who admittedly had none; and by giving an *Ex post facto* operation to the right of occupancy provisions in respect of both classes, it did not allow the landlords time to provide by contract against the acquisition by the latter class of a right which they had not a shadow of claim before.¹

The twelve years' rule for acquiring occupancy right became the *Magna Charta* of the cultivating classes in Bengal and the North Western Provinces (now the United Provinces of Agra and Oudh) to which Act X of 1859 applied, conferring as it did on them the inestimable blessing of fixity of tenure, a hereditary right, a protection from arbitrary eviction, undue enhancement and rack-renting.

There is however one school of opinion according to which the immemorial custom of the country gave rights of occupancy to all resident raiyats of the village, who had in the earlier laws and Regulations been vaguely styled *khud kasht* or *kadimi*. It is urged that to make the accrual of the occupancy rights dependant upon twelve years cultivation of a particular piece of land, and to allow such accrual to be barred by written contract was a serious infringement of the customary rights of the resident raiyats of the country.² Thus "the selection of twelve years as the necessary period of prescription for occupancy," according to Mr. Okineally and others, "inflicted serious injury on the resident raiyats by placing them in the position of *tenants-at-will* in respect of all lands, of which they could not prove twelve years' continuous occupancy."³ Mr. Justice Field, however, is of a contrary view. According to him that does not of itself cut down the rights of any *khud kasht*.⁴

Khud Kashts reduced to tenants-at-will in respect of lands not in their possession for more than 12 years.

Regarding the other question *viz.*, the question of rent, we have seen that at the date of the Permanent Settlement there were two classes of raiyats—the *khud kasht* and the *paikasht*, and a class *en posse*, who though then belonged to the rank of *paikasht*, may at any time grow into the other class. The *khud kasht* being a member of the village group, for him the ancient rule of customary rent ought to be the rate of rent, and the original position of the *paikashts*, being, as we have seen, tenants-at-will, subjected them to contract rent and did not entitle them to claim customary rent. In

Question of rent.

¹ *Ibid*, Introduction to Regulations, 51, foot note 3.

² Selections from papers relating to Bengal Tenancy Act, 1885, 44.

³ Okineally's Note—Calcutta Gazette, 646; Mackenzie's Note—do.

⁴ Rent Law Commission Report.

Under
Permanent
Settlement
Khud kasht
liable to pay
customary
rent.

Paikasht
contract rent.

No known
pargana raté.

Customary
and fair
rent.

Protection
against
enhancement.

conformity with the above principle, we find that Section 60 of Regulation VIII of 1793 provided for the *khud kasht* raiyats then existing on the land that their *pattas* could be cancelled upon proof that the rents paid by them within the last three years had been reduced *below the rate of the nirikk bundi of the pergunna*. The principle underlying this provision is that the *khud kasht* raiyat then existing on the land was bound to pay rent at the *pargana nirikk bundi*. This is more clear in Regulation XLIV of 1793, Section 5, according to which, the auction-purchaser (at the revenue sale) could recover from raiyats and under-tenants whatever the former proprietor would have been entitled to demand, *according to the established usage and rates of the pargana or district*, in which such lands may be situated. For the *khud kasht*, therefore, the Legislature provided the *pargana or customary* rent to be the limit of rent. For the *paikasht* or *khud kasht en posse*, Section 52 of Regulation VIII of 1793 provided that the Zemindar could let his land to him in whatever manner he might think proper, thus leaving him entirely to *contract rent*. We may, therefore, take it that the Permanent Settlement accepted the ancient theory of rent that the *khud kasht* was to pay the customary and the *paik sht* the contract rent. For the latter no limitation whatever is made, except the prohibition of the imposition of *Abwabs* etc.

The original Bill (which passed into Act X of 1859) following the phraseology of the existing law, declared raiyats not holding at fixed rates entitled to *pattas* at *pargana rates*. This expression was objected to on the ground that there were really *no known pargana rates*. The recognition of the right of occupancy in the raiyat implies necessarily some limit to the discretion of the landholder in adjusting the rent of the person possessing such a right. There was a discussion on this subject between the Government of the North-Western Provinces, the Sadar Court and the Board of Revenue, and it was then apparently admitted that it was the acknowledged right of the raiyat to hold at "*customary and fair*" rates. The select committee have adopted similar phrase, and have endeavoured to lay down rules by which the fairness of the rates may be ascertained.¹

"At the passing of Act X of 1859," said Mr. O'Kineally "every ordinary resident *raiya*t was entitled to receive *pattas* according to the *pargana rates*; he was equally entitled to their renewal; and the result of this was that the rates of rent but very slowly increased, and increased up to 1822

¹ Report of Select Committee.

only by the sheer force of the power which the Zemindar obtained from being looked on as an English proprietor.”¹ “***The Government of that time considered that by declaring the common law that the Zemindars are bound to give *pattas* at the customary rates with a right to perpetual renewal, they had guarded the raiyat against all probability, indeed, possibility, of such a claim being advanced, and where they held possession of lands, the raiyats were protected. But in regard to the lands held by the Zemindars, the principle of non-intervention between the Zemindar and the raiyat inculcated and enforced after the Settlement, was destructive of the *raiya*s’ interest. The expectations, based on the promulgation of the laws, the public spirit of the people, the interference of the courts, and the penal provisions compelling Zamindars to give leases defining the rates of rent, were never realised. The Zemindars got the period within which they were compelled to grant leases extended, until the object of the law was forgotten, and then they ignored it.”² Thus Act X of 1859 in effect deprived the resident *raiya*s as such, of the right to claim *pattas* at *pargana rates*, and limited the right to claim *pattas* at fair and equitable rates to those who could prove twelve years occupancy. Further the Act furnished the Zemindars with a new weapon for enhancement on the score of *increase in the value of the produce*. Zemindars never had, before the passing of Act X of 1859, the right to enhance on the ground of a general increase of prices.”³ “The net result of the working of the provisions regarding the enhancement was”, according to Mr. Justice Field, “that while a large number of *raiya*s have, under the provisions of the Act X of 1859, received protection from eviction and therefore from rack-renting, those provisions of the Act have completely broken down by which Legislature undertook to provide for the adjustment of rent in cases in which the Zemindars were conceded to have a reasonable claim to enhancement.”⁴

During the first half of the nineteenth century, while the incident of the land revenue was still high and land of much less value than now, the rent question, though frequently discussed, was not looked upon as one of special urgency. But as population increased and the competition of tenants for land became more keen, it was felt that some system should be prescribed by law to guide the landlords

Enhancement
below
economic
rent.

¹ O’Kineally’s Note, Calcutta Gazette, 466.

² *Ibid.*, 477.

³ *Ibid.*

⁴ Filds’ *Landholding &c.*, 764.

and the courts in the matter of enhancement and eviction, and with this object Act X of 1859 was passed for regulation of the rent questions in Bengal. In dealing with the tenants, this Act reproduced and crystallised a distinction, which had in a vague and indeterminate manner, governed hitherto the treatment of the cultivators. It may be said generally, that the cultivator was never ousted from his holding so long as he paid the dues expected from him; and, although there was nothing in law or theory to prevent the indefinite enhancement of such payments, the cultivators were so few and so valuable that in practice the *enhancement seldom exceeded the full economic rent*. In addition however, to the cultivators so treated, there was always a class of men who were on a more temporary footing—men who came from outside villages or constantly wandered from place to place; it was felt that as regards these men the same customary obligation did not apply. The Act of 1859 accordingly divided the tenants, on the above lines into ‘*occupancy*’ and ‘*non-occupancy*’ and gave to the former a greater degree of protection than to the latter. In distinguishing the two classes, the principle of prescription was followed as the best practical guide, and the continuous cultivation or holding of land for twelve years was declared to entitle the tenant to a ‘*right of occupancy*’ in the land so cultivated or held.¹

Nature of
rent—
economic or
customary.

Meanwhile another controversy had broken out regarding the enhancement sections of the Act. In 1862 Sir Barnes Peacock, the then Chief Justice of Bengal, had laid down the doctrine that rent in Bengal was “*economic rent*” as defined by Malthus *viz.*, “that portion of the value of the whole produce, which remains to the owner of the land after all the outgoings belonging to its cultivation, of whatever kind, have been paid, including the profits of the capital employed, estimated according to the usual and ordinary rate of agricultural capital at the time being.” He further denied that an occupancy raiyat had any right to have his rent fixed at a lower rate than that which a tenant not having a right of occupancy, would give for the land. This decision was strongly assailed as subversive of the customary rights of the raiyats of Bengal, and contrary to all the undertakings given by the authors of the Permanent Settlement. In 1865, the matter came before a Full Bench of the Calcutta High Court in what is known as the *Great*

¹ *Imperial Gazetteer of India: The Indian Empire*, Vol. III, Economic, 448—449.

*Rent Case*¹. The result was that the Full Bench by a majority repudiated the doctrine of "*economic rent*", and decided the theory that the rent ought to be fixed by competition. as inapplicable to the customs and conditions of the country. They held that a raiyat was bound to pay a *fair and equitable rent*, which should be "that portion of gross produce, calculated in money, to which the Zemindar is entitled under the custom of the country"; and that in order to ascertain this share, regard should be had to the *pargana* rates, rates paid for similar lands in adjacent places, and rates fixed by the law and usage of the country². Since this decision, the claim that rents in Bengal are pure economic rents to be fixed by competition has never been accepted in responsible quarters.

Such being the accepted theory of rent, the Rent Law Fair and Commissioners observe:—"The conclusion then to which we feel guided upon the whole subject of settlement of rents and ^{Fair and Equitable rent.} enhancement is, that the safest course for the legislature is to lay down certain broad lines upon which the officers of Government shall proceed in this matter—at the same time providing certain positive checks which experience has shewn to be necessary in order to prevent sudden and great changes in the respective conditions of landlords and tenants in Bengal." And this has been done in the Act.

Thus the rent legislation of Bengal has this special characteristics that it starts from a basis of custom and, while accepting the legitimate influence of competition, seeks ^{Competition restricted by custom.} to confine that influence within reasonable limits. It aims, not so much at the curtailment of advantages naturally accruing to landlords, as at the maintenance of rights already conferred on tenants by custom. Custom therefore still to a large extent, the foundation of Indian rents.³.

Another question on which a good deal of controversy ^{Transferability of raiyat's right.} raged was as to the *transferability of the occupancy right*. Mr. Shore (afterwards Lord Teignmouth) in his celebrated Minute which accompanied the proposal for the Permanent Settlement in Bengal, writing of the *khul kasht* raiyats pointed out:—"It is however generally understood that the ryots by long occupancy acquire a right of possession

¹ *The Great Rent case*—B. L. R. F. B. 202: Rampini's *Bengal Tenancy Act*, 3rd Ed., Introduction, xi.

² Selections from paper relating to B. T. Act, 44.

³ *Imperial Gazetteer of India: The Indian Empire*, Vol. III, Economic, 454.

¹ B. L. R., F. B. 202, Rampini's *Bengal Tenancy Act*, 4th Ed. Introduction, xi.

in the soil, are *not subject to be removed*; but this does not authorise them to sell or mortgage it, and it is so far distinct from a right of property"¹. Mr. Harington, another authority, writing on the same subject observed:—"The *khand kasht* ryots have * * enjoyed the privilege of holding the possession of their lands even *hereditarily on a fixed rent*, the right of disposing of them, by sale, gift, or other modes of transfer, still continuing under limitations, with the Zemindar or Talukdar exclusively. * * On the whole I do not think the ryot can claim any right of alienating the lands rented by them by sale or other modes of transfer"². We have already shown that before the beginning of the British Government though the raiyats were allowed to transfer their lands among themselves, transferability was not an incident of the raiyati holding. This was not because they had no power to transfer, but because the economic conditions were such that lands had no value and therefore transferability was not then, as it is now, an incident of proprietary right in the modern sense. And, according to the authorities quoted above, even before the Permanent Settlement raiyats had no transferable rights in their holdings. The Permanent Settlement did not confer on the raiyats the right of transfer. The earlier Regulations seem to have adopted this view.

Before and
after Perma-
nent Settle-
ment

As pointed out by Phear J :—"As the authorities stand this question seems to be one of some nicety, and in considering it there is need to bear in mind that the relations between the Zemindar and the raiyat are not generally the same as those between the English landlord and tenant. No doubt the Zemindar has been made by legislative enactment the proprietor of the land which forms his Zemindari, and as regards his *khamar*, *nerj-jote* or *sur* land, it may be taken that the cultivator of the soil has generally no other rights than those which he obtains as a tenant by contract with the Zemindar; but with regard to the *raiyni* lands which constitute the bulk of his Zemindari, it is much otherwise. Then, while the Zemindar is still the proprietor of the land, the raiyats of the village, as the combined effect of custom and legislation, have in most, if not in all, cases some *right to cultivate the raiyati land of the village*, which is *altogether independent of the Zemindar*, and which, in the case of a raiyat having a right of occupancy, is a *right to occupy and use the soil, quite irrespective of any assent or permission on the*

¹ Extracts from Harington's *Analysis*, 267.

² Ibid. * * * * * 300-301.

part of a Zemindar. This right resting upon legislation and custom alone, is not derived from the general proprietary right given to the Zemindar by the legislature, but is, as I understand, *in derogation of*, and has the effect of cutting down and qualifying, *that right.* * * * Whatever the raiyat has, the Zemindar has all the rest which is necessary to complete ownership of the land; the *Zemindar's right amounts to the complete ownership of the land subject to the occupancy raiyats' right*, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained there must remain in the Zemindar all rights and privileges of ownership which are not inconsistent with or obstructive of them. And amongst other rights, it seems to me clear that he must have such a right as will enable him to *keep the possession of the soil in those persons who are entitled to it and to prevent it from being invaded by those who are not entitled to it.*"¹

It is clear from Clause 7, Section 15 of Regulation VII of 1799 which speaks of "a lease-holder or other tenant having a right of occupancy only so long as a certain rent or a rent determinable on a certain principle according to local rates and usages, be paid without any right of property or transferable possession"—that the raiyats' holding was not *transferable*. But the language used in Section 33 of Regulation XI. of 1822 that "Nothing in the said section (9 of Regulation V of 1812) was intended, or shall be constructed to affect, the right of any individual possessing a *transferable* or hereditary right of occupancy to contest the justness of the demand so made"—leads us to the inference that in some places at least a *custom had grown up making the khud kasht right transferable*. And it has been laid down that a *khud kasht* raiyat with a right of occupancy might transfer, if there is a custom authorising such transfer; that is, if the original holding was transferable.² But with regard to such transfers it may be said that there may be found in certain localities or all over Bengal, *instances of transfer* but they are instances merely and do not go the length of establishing the right. But even then it is seldom found that the land-lords have recognised such transfers without payment of *Nazar*. And Sir Richard Garth, one of the eminent Chief

Growth of custom of transferability.

¹ *Suhodras v. Smith*—20 W. R. 139—12 B. L. R. 82; See Reg. VII of 1799, Sec. 15 cl. 7.

² *Chandra v. Kedarmani*—7 W.R. 247; *Narendra v. Ishan*—18 B.L.R. 274; *Juggut v. Ramnarain*—1 W.R. 126; *Unnopurna v. Ooma*—18 W.R. 55; *Sreeram v. Bissonath*—3 W.R. Act X 3.

Justices of Bengal, in his note on the Bengal Tenancy Bill remarked:—"Such tenures (that is, occupancy holdings) have never been yet transferable except by special custom, and such a custom is very rarely proved. I have known it repeatedly attempted in Moffusil Courts but very seldom proved." Mr. Justice Field was of the opinion that *raiya*t holdings were not transferable before the Permanent Settlement, and Sir Richard Garth in his Minute of 8th January 1880, referring to Mr. Justice Field's opinion, says:—"He admits at the outset that before the period of British Supremacy in India, tenures, as a rule, were not alienable and also that at and after the time of the Permanent Settlement it was always considered, both by the Legislature and the courts, that *raiya*t's tenure, whether they were permanent or temporary, were not transferable. A *raiya*t's power of transfer came in question before the Saddar Dewany Adalat in 1855 and it was said of the purchaser: "He bought 'as he thought something; the principle of *caveat emptor* strictly applies; and it was for him to look to the certainty of getting a consideration for this purchase-money. The party whom he succeeded had no equivalent to offer; he had only a *right of occupancy so long as he paid his rent*; failing to do so either from inability or from unwillingness, the possession returned to the proprietor, the contract being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845, or in cases where a bonus had been given, thereby creating in the *raiya*t a right of occupancy to that extent, are considered tenures transferable by *raiya*t."¹

Transfer-
ability of
statutory
right.

We have already seen that before the passing of the Rent Law of 1859 the rights of the *raiya*t's were not defined and extremely uncertain. But it is beyond doubt that they could not alienate their lands. And, as pointed out in some cases, "although the *statutory right of occupancy*, which is the creation of Act X of 1859, is analogous in some respects to the rights of the *khud kasht*, its nature cannot be ascertained by a reference to such rights or to custom. Occupancy tenants of course may have customary or other rights in addition, but it is difficult to see how these can assist in determining their rights as occupancy *raiya*t's."² The right is necessarily acquired by holding upon a tenure which is either hereditary and transferable or not; and at one time it was a question whether a right to occupy and not to be ejected so long as the rent is paid, is added to the right already

¹ *Hyat v. Akbar*—(1885) S.D.A. 20.

existing, so that it becomes a part of the tenure and goes with it, being transferable when the original tenure was so. It has been held that the acquisition of an occupancy right would not render a tenure transferable, which before it was not so. It was not the intention of the Legislature, when passing Act X of 1859 to alter the nature of a *jote* and convert a non-transferable *jote* into a transferable one, merely because a raiyat had held it for twelve years and thereby acquired a right of occupancy."¹ And in most of the cases in which a right of occupancy was decided not to be transferable the original tenure was not transferable. It was decided by a Full Bench of the Calcutta High Court that the statutory right of occupancy is not transferable *as such*, and the decision was grounded on the *personal nature* of the right. Sir Richard Couch C. J. in that case in reference to §6 of Act VIII of 1869 B. C. remarked :—"The ordinary construction of the words appears to be that the right is only to be in the person who has occupied for 12 years and it was not intended to give any right of property that could be transferred. It is a right to be enjoyed only by the person who holds or cultivates and pays rent and has done so for a period of 12 years."—And Phear J. in the same case considered that "the right was rather in the nature of a *personal privilege* than a substantive proprietary right."²

As a general rule it has been laid down by the judgment just referred to that, when a tenure was not transferable upon the passing of Act X of 1859, the passing of that Act would not have the effect of rendering it a transferable tenure ; but that ruling specially exempts cases in which rights of occupancy and tenures of a similar description were transferable by *local custom*²—that is, according to the custom of that part of the country in which the tenure is situated. In every district of Bengal there is a different custom—what is the custom in lower Bengal is not so on the eastern and northern parts, and *vice versa*. In some parts the *khud kasht* tenants are allowed to sell without reference

Nature and
proof of
custom.

¹ *Chandra v. Kedarmoni*—7 W. R. 247 : *Narendra v. Ishan*—1 B. L. R. 274 : *Jugut v. Ramnarain*—1 W. R. 126 : *Unnopurna v. Ooma*—18 W. R. 55 : *Sreeram v. Bissonath*—3 W. R. (Act X) 3.

² *Ajodhya v. Emam*—7 W. R. F. B. 528—B. L. R. Sup. 725 : *Durga v. Brindavan*—11 W. R. 162—2 B. L. R. A. C. 37.

¹ *Ajodhya v. Emam*—7 W. R. 528 F.B. : *Durga v. Brindavan*—2 B. L. R. A. C. 37—11 W. R. 162.

² See above and *Narendra v. Ishan*—22 W. R. 22 F. B.=13 B. L. R. 274.

to their landlords, in other parts the practice has not been allowed : and the only method by which the question whether the tenure is transferable or not by custom can be decided, is by reference to *local custom*.¹ A custom of this nature need not be absolutely *invariable* ; it can be proved by evidence amounting to much less than this.² There was no necessity to fix any *particular time* from which such tenures become transferable from one party to the other. It was sufficient that there was evidence of the *antiquity* of the custom to establish the fact that there is at present the custom referred to and that no evidence to the contrary was adduced.³ But the custom must be a custom that *sales are effected in spite of the landlord*, and proofs of *instances of sales* must be such that the sales took place without the consent of the landlord and still hold good. Where the sales were sales in execution effected *at the instances of the Zemindar himself*, they could not be evidence of the right on the part of the raiyats to transfer without the assent of the Zemindar.⁴ Thus the right of occupancy which is created by the statute was not transferable *ipso facto*. But when there was custom which allowed a transfer of occupancy holdings inspite of the landlord that custom was maintained.

Effect of
transfer.

There has been considerable discussion as to the *effect of a transfer* of a holding in which the tenant has only a right of occupancy and which, as we have seen, cannot itself be transferred. In a leading decision upon the point, it was held that an attempt to transfer a right of occupancy by a raiyat, who quits his occupation and ceases himself to cultivate or hold the land, may be treated as an *abdoument* of the right so as to entitle the landlord to evict the transferee.⁵ But the landlord could not evict the transferee so long as the recorded tenant or his representative paid the rent, but he was not bound to recognise the transfer or take rent from the transferee.⁶

Right if
heritable.

The right is not expressed to be *heritable*, but it is provided that "the holding of the father or other person from whom a raiyat inherits shall be deemed to the holding of the raiyats within the meaning of Act X." The possession only refers to the acquisition of the right, and the right,

¹ *Joykishen v. Raj Kishen*—1 W. R. 153.

² *Chunder v. Peary*—6 W. R. 190.

³ *Joykishen v. Doorga*—11 W. R. 348.

⁴ *Sahodra v. Smith*—20 W. R. 139 *Per Phenr J.*

⁵ *Narendra v. Ishan*—13 B. L. R. 274.

⁶ *Joykrishen v. Rai Kishen*—5 W. R. 147.

when acquired, is nowhere declared to be heritable ; and the literal meaning of the terms used would not necessarily include an hereditary quality in the right. Moreover the right being created by the statute the analogy to the right of the *khud kashl* cannot be of any help in the matter.

We need not pause to consider the Bengal Act VIII of 1869, which was only a new edition of Act X of 1859 with certain amendments of detail (not of principle) as regards the tenants' rights, and, although it was expressly confined to an amendment of the existing law in respect of procedure and jurisdiction, the discussion on the Bill which was passed into the Act, brought out numerous admissions as to the necessity which existed for revising the substantive law of 1859 in regard to the accrual of occupancy rights and the enhancement of rents.¹

It is necessary to deal with the *defects* that were found in the practical working of these Acts in order to trace the further changes in the position and status of the occupancy raiyats. The position of the occupancy raiyat under the Act was stated by Sir Stuart Bailey (the member in charge of the Bill that subsequently passed into the Bengal Tenancy Act) in the following way :—(a) He had a great difficulty in making good his title to occupancy rights. He was required to prove that he had held *every particular field* of his holding *for twelve consecutive years*, and, in the absence of any trustworthy village records, the proof was often impossible. He and his forefathers might have resided in the village for generations, but evidence of this was entirely immaterial to the issue. He might be able to shew that he had held *some* land in the village, in every year of the last twelve, but if the fields had been changed, his claims to the occupancy right could not be maintained (Section 6) : [Hence it became the ambition of every tenant to retain possession of his fields for twelve years, while to many landlords it seemed the right and proper thing to avail themselves of every provision of the law and of every ingenious device to defeat continuous possession. It was a very common practice with the landlords to *evict* the tenant before his twelve years were made up, *and then to reinstate* him or to induce him to change the particular fields he held for others. The fear now was that the landlord might defeat the law by *shifting the tenant* from one holding to another without incurring the odium of

Act VIII of
1869 B.C.

Defects of
former law.

¹. Selections from *Papers Relating to B.T. Act*, 44.

ejecting him altogether. It was to put a stop to this practice that the subsequent law has made it suffice to hold *any* land in the village.] (b) The law, not content with making the proof of occupancy rights very difficult to the raiyat, allowed him to *contract himself out of them* (Section 1) ; and these engagements, entered into without understanding, and forced on the raiyat without adequate consideration, were rapidly becoming a common form ; (c) The law gave the occupancy raiyat no protection from *incessant enhancement*. It enumerated, it is true, the grounds on which the enhancement might be sought, but it did not prescribe the term for which a rent, after enhancement, was to hold good, and it did not prevent a landlord from instituting annual enhancement suits, or from annually serving the raiyat with a demand for an enhanced rent (Section 17 of Act VIII 1869 B.C.=Section 16 of Act X) ; (d) It placed inseparable obstacles in the way of the zemindar who sued for an enhancement of his rent. Under it the courts of law demanded from him the impossible proof that the value of the produce had increased in the same proportion in which he asked that his rent should be enhanced. Thus in many cases the zemindar could not secure the enhancement that was legitimately due to him ; (e) The law did not define the *raiya's* right to *make improvements*, even of the most ordinary and necessary character, nor did it determine his right in them in the event of being ejected ; (f) The law made every instalment an arrear of rent, that was not paid on the exact date fixed in the raiya's engagement or by custom, and allowed a landlord to institute a *separate suit for each instalment in arrear*. As the custom of monthly instalments is common, the harassment which a landlord might thus inflict on his raiyat was intolerable (Section 21 of Act VIII=Section 20 of Act X of 1859) ; (g) The law made the raiyat liable to *ejectment* in execution of a decree for an arrear of rent, even though the sale of his occupancy right by auction, would more than satisfy the debt. Thus he lost, and the landlord acquired, not only the value of his interest in the land, but also of any improvements he might have made, or of any crops which might be still on the ground (Section 22 of Act VIII=Section 21 of Act X) ; (h) The law of *distrain* was such that under cover of it the landlord was able, if disposed, to exercise a ruinous interference with the raiya's disposition of his crops and reduce them to beggary (Section 68 of Act VIII=Section 112 of Act X).¹

¹. Bailey's Speech while introducing Act VIII of 1859.

CHAPTER VIII.

THE GROWTH OF OCCUPANCY RIGHT.

—*The Effect of the Bengal Tenancy Act, 1885.*

When Sir Rivers Thompson assumed the administration of Bengal in April, 1882, the question of the amendment of the Rent Law in the Lower Provinces, which had for nearly ten years been the subject of agitation and discussion, had reached a stage at which it was certain that some legislative measure would be introduced, though the nature of that measure had not yet been finally determined. As early as 1868 Lord Lawrence, as Governor-General, recorded a Minute relating to the depressed state of the peasantry in Bihar in which he said that he believed that "it would be necessary for the Government sooner or later to interfere and pass a law which should thoroughly protect the raiyat and make him, what he is now only in name, a free man, a cultivator with the right to cultivate the land he holds, provided he pays a fair rent for it." The necessity for legislation had indeed been apparent from the wide-spread agrarian discontent in East Bengal, which culminated, in 1873, in serious disturbances in the Pabna District, where the cultivators banded themselves together to resist short measurements, illegal cesses and the forced delivery of agreements to pay enhanced rents (on the part of the landlords). The report of the Famine Commission after the Bihar famine of the following year dwelt strongly on the necessity of placing the relations of landlord and tenant in Bengal on a surer basis. The Agrarian Disputes Act of 1876 was passed by Sir R. Temple's Government as a temporary measure to meet the emergencies like those of 1873, pending a fuller consideration of the whole question. A Bill dealing with the principles on which the rents should be fixed was prepared in 1876 but was not proceeded with. But a Bill to provide for the more speedy realisation of undisputed arrears of rent was introduced in 1878. The Select Committee on this Bill recommended that the whole question of the revision of the Rent Law should be taken in hand. Accordingly in 1879 the Government of India sanctioned the appointment of a Commission with instructions to prepare a digest of the existing statute and case-law relating to landlord and tenant and to draw up a consolidating Bill. ¹ The Report and Draft Bill of the Commission were presented in 1880 and the

Necessity for further legislation.

Depressed state of peasantry in Bihar

Agrarian disturbance in Bengal.

Rent Law Commissioner.

Bill introduced.

matured proposals of the Bengal Government were submitted to the Government of India in 1881, which were forwarded to the Secretary of State the following year with an important despatch in which the history of the question was reviewed and the views of the Governor-General-in-Council were fully explained. The reply of the Secretary of State was received in a few months. A revised draft of the Bill was then prepared in the Legislative Department of the Government of India, and on the 2nd March, 1883 Mr. Ilbert moved in Council for leave to introduce it. On the 12th March Sir Stuart Bailey, in whose charge the Bill had been placed, moved that it should be referred to a Select Committee which included members holding the most diverse views. The meetings of the Committee commenced in November, 1884 and carried on till the following March. The Select Committee held not less than 64 meetings and had before it several hundreds of reports, opinions and memorials. The result was that the Bill which finally commended itself to the approval of the Council was in some respects a compromise, and, if it was less thorough and complete, was certainly a more practicable and workable law than the draft which was originally laid before the Council. The Bill was passed by the Council on the 11th March; it received the assent of the Governor-General on the 14th and became law as Act VIII of 1885. The Act came into force on the 1st November following (except a certain chapter).

Different proposals regarding occupancy right.

The Rent Commission had desired to maintain the existing rule by which the occupancy right was acquired by *twelve years' continuous possession*. The Government of Bengal had recommended that the occupancy right should be enjoyed by all *resident raiyats*. But the Government of India proposed to take the classification of lands, instead of the status of the tenant, as the basis on which the recognition of the occupancy right should be effected, and to attach the right to all *raiylati lands*. It appeared to the Secretary of State that this involved a great and uncalled for departure from the ancient and the existing law of the country and he declined to sanction it. The Bengal Government, while again submitting its views on the revised draft of the Bill, as presented by the Select Committee, proposed to allow the *free transfer* of occupancy holdings in Bengal, giving the landlord however a veto if the transfer were to any but an *agriculturist*; to leave such transfers in Bihar to be regulated by custom; to omit clauses in the Bill which gave the *landlord a right of pre-emption*; to abandon the provisions for enhancement on the grounds of the prevailing rate and

of the increased productive power of the land ; to withdraw all limitations upon enhancement by suit, but to maintain them in cases of enhancement by contract : to restore the check which limited enhancement to a certain proportion of the gross produce ; to provide that tables of rates should be prepared only on the application of parties ; to retain substantially the existing law of distraint ; and to provide for a cadastral survey and the preparation of a record of rights.

The Bill as originally brought in, embodied provisions by which the *settled raiyat acquired an occupancy right in all lands held by him in the village or estate*. The Act limited this to lands held in the same village. The Bill empowered the occupancy raiyat to transfer his holdings, subject to a right of *pre-emption in the landlord* to have them at a price to be fixed by the Civil Court. In the Act the pre-emption clauses were struck out, and the power of *transfer* was left to be regulated by *local custom*. The rent of an occupancy raiyat could not be enhanced under the Bill, to an amount exceeding one-fifth of the gross produce, but no limitation of this kind finds a place in the Act. In suits for enhancement, the Bill provided that no increase of demand in excess of double the old rent should be awarded ; but there is no corresponding provisions in the Act. The only material point on which the Bill was modified in the opposite direction was in the enhancement of the occupancy raiyats' rent by contract out of Court. The Bill allowed such enhancements to the amount of six annas in the rupee upon the old rent ; but the Act reduced this to two annas in the rupee, the Government of Bengal being pressed with the danger of allowing pressure to be put upon old tenants to enter into contracts which would virtually defeat the object of the Legislature.

How far
accepted in
B. T. Act.

The Bengal Tenancy Act, perhaps the most important measure, passed into law since the Regulations of 1793 had been promulgated, whereby Government endeavoured to redeem the pledge for protecting the interests of the *raiya*s given at the time of the Permanent Settlement, will be found on examination to have had three main objects in view, to one or other of which almost all of its sections can be referred. The ancient agricultural law of Bengal was founded on a *system of fixity of tenure at customary rents*. But this system was gradually ceasing to be suited to the altered economic conditions of country, and the attempts which were made to solve the question by substitution of positive law for customary usage had hitherto been unsuccessful. In some parts of Bengal where the Zemindars were powerful, the

Principles of
B. T. Act.

*raiya*t was treated as mere tenants-at-will; in other parts in which the population was comparatively sparse, the *raiya*t refused to pay any rent unless the Zemindars agreed to their terms. Act X of 1859 rather added to the difficulty than removed it. On the one hand, this Act made it almost impossible for the *raiya*t to establish a right of occupancy; on the other hand, it placed insuperable obstacles in the way of the Zemindar who sued for an enhancement of his rent. The courts of law with rigid impartiality required the *raiya*t to establish his occupancy right by shewing that he had cultivated the same plot of ground for twelve successive years, and demanded from the landlord the impossible proof that the value of the produce had increased in the same proportion, in which he asked that his rent should be enhanced. The legal maxim *semper presumitur pro negante* was never more copiously illustrated than in the various phases of this rent litigation. The party on whom lay the burden of proof was almost certain to fail. To this evil the Bengal Tenancy Act intended to afford a remedy. The principle of the Act may be said to be based upon a system of *fixity of tenure at judicial rents*: and its main objects are:—*first*, to give the settled *raiya*t the same security in his holding as he enjoyed under the old customary law; *secondly*, to ensure to the landlord a fair share of the increased value of the produce of the soil; and *thirdly*, to lay down rules by which all disputed questions between landlord and tenant can be reduced to simple issues and decided upon equitable principles. A good example of the *first* will be found in the clause which throws upon the landlord the onus of disproving the *raiya*t's claim to a right of occupancy; the *second* is illustrated by the section relating to price lists which relieves the zemindar of the trouble of shewing that the value of the produce has increased; and the *third* pervades the whole Act, and is especially conspicuous in the valuable section which authorises an application to determine the incidents of a tenancy and in the Chapter which relates to the record of rights and settlement of rents. The maintenance of the principles of the Act is further safeguarded by the section which restricts the power of the *raiya*t to enter into contracts in contravention of its fundamental principles.¹

¹ Selections from *Papers relating to Bengal Tenancy Act, 1885*, pp. 44—46: *Bengal Supplementary Administration Report 1882—87*, pp. 94—99.

To turn to the provisions of the Act :—

Provisions
of B. T. Act.

(a) Act X of 1859 was deficient in grasping, in as much as it failed to provide for a complete and satisfactory definition and adjustment of the mutual relations—the rights and obligations of the various classes of the landlord and the tenant. It did not define “*tenant*” or “*raiyat*”, “*tenure*” or “*holding*”, and used the term “*tenure*” indiscriminately to denote the interest of a tenure-holder as well as of a raiyat, and the result was that the High Court had in several cases felt great difficulty in defining the status of a raiyat and in distinguishing it from that of a tenure-holder, as the incidents of an ordinary raiyat’s holding differed in material respects from those of a tenure¹. But the B. T. Act has put an end to this confusion by *classifying the tenants* and giving separate names to separate interests. [Chapter II]

Distinction
between
raiyat and
tenure-holder.

(b) Act X contained no definition of “*rent*”. Even after it had come into force and for a long time afterwards, the judges were not agreed as to whether the amount payable by a middleman or tenure-holder, who had parted with physical, though not legal, possession of the land, was legally speaking *rent*. In the view of the legislators of the days of the Regulations, the transfer of land at a fixed rent in perpetuity, was a conveyance of proprietary right, and the annuity payable to the transferer was not ‘*rent*’, but was regarded as ‘*revenue*’. Later on, a distinction was made between ‘*rent*’ and ‘*revenue*’, and the term “*land-revenue*” came to mean the amount payable by a proprietor to the State, while ‘*rent*’ the amount payable by a tenant to his landlord, whether as a raiyat or a tenure-holder. There was also a doubt as to whether the amount payable by a middleman or tenure-holder was a *charge on the land* or not. These doubts have been set at rest by B. T. Act [Sections 5 and 65].

Definition of
rent.

(c) The Act by returning to the old principle of *khud kash* raiyats, gives him occupancy right not only in the lands held by him actually for twelve years, but in *any* land held by him in the village; and it meets the great blot of the old law by facilitating his proof of these rights. He has merely to shew that he has held *some* land continuously within the village boundaries for twelve years, and he then becomes a *settled raiyat* of his village and acquires occupancy rights in all the lands which he may hold in the village at the present or in any future time. [Section 21]. In order to facilitate proof the Act creates a presumption in favour of the raiyat and throws on the landlord the *onus* of

Acquisition of
occupancy
Right.

disproving the raiyat's claim to a right of occupancy. It is presumed in his favour, in the absence of proof to the contrary, that he is an occupancy raiyat of the land which he is found to be holding [Section 20].

(d) The Act *prevents* the occupancy raiyat from contracting himself out of his status [Sections 178].

Ejectment.

(e) The occupancy raiyat's liability to *ejectment* has also been restricted by definite rules [Section 25].

Amount of rent.

(f) With regard to the *amount of rent* payable by the raiyat, we have seen that the theory of *economic rent* was long abandoned, as being unsuited to the conditions of the country, and the principle of "*fair and equitable rate*" was adopted as the standard for the raiyat's rent. But difficulty arose in setting up *one uniform standard throughout* the country. Owing to historical causes and peculiar local conditions the pitch of rent was unequal in different parts, and it was not thought wise to level down the existing inequalities according to one uniform standard. It was therefore decided to start with the presumption that the existing rents were fair and equitable [Section 27] and to provide for *enhancement* [29—30] or *reduction* [Section 38] according to certain fixed principles.

Enhancement up to prevailing rate.

(g) In regulating future *enhancements* regard was had to existing inequalities, so that those landlords, who had already benefitted more than others, were not thought to be entitled to an equal advantage in the future. But those, who had in the past remained contented with comparatively low rates of rent, should in equity be held entitled to raise them to the *level of those prevailing in the vicinity*, and placed on equal footing with his more exacting brothers. It was accordingly provided that in any case in which the rent payable by the occupancy raiyat was below the prevailing rate payable for lands of a similar description and with similar advantages, it may be enhanced subject to such limits as the Court thinks equitable [Section 30 (a)]. The claim of the landlord to enhancement of rent on the ground of *increase in the productive powers* of the holding of the occupancy raiyat has been recognised. Where the increase was caused by the agency or at the expense of either the landlord or the raiyat he is declared entitled to the whole of the increase; but where it is due to fluvial action, without the agency of expense of either the landlord or the raiyat, the increment is, as a general rule, to be divided equally between them [Section 30 (c) and (d).]

For increase in productive power.

The rapid rise in the value of agricultural produce pressed itself to the notice of the Legislature. It was due to several causes. In the first place, as the enormous increase in population caused an enormous demand in the food grains which the cultivation of all available lands was hardly able to supply, the prices rose under the operation of the economic law of demand and supply. Besides, a large and ever expanding export trade, over and above the demand within the province itself, still further raised the prices. In the next place, the depreciation in the value of silver diminished the purchasing power of the rupee and caused a rise in the money value of the agricultural produce. In so far as the rise in prices due to the first cause, the zemindar, who shares with the raiyat an interest in the land, is entitled to a share in the increase in value of its produce, which enhances the value of his interest in the land. The effect of the second cause was to diminish the value of the rent payable in cash to the landlord. Fortunately, however, for the raiyats the upward much of the prices of agricultural produce set in after the lapse of several years, raised the value of the food grains much above the customary rates, and out of all proportions to the rents, paid by them to their landlords for lands held by them. The question that now pressed heavily for solution was—who, the landlord or the tenant, was entitled to profit most by the change in the economic conditions thus brought about. The large mass of litigation between the landlord and the tenant at this period was in reality a struggle between them for the unearned increment. At this juncture the Government felt compelled to intervene and passed Act VIII of 1885 by which it sought to lay down the principle according to which the increment was to be apportioned between the parties. It is recognised that the land-lord was entitled to a substantial share of the increased profits, whether it resulted from the one cause or the other. The practical apportionment of the increase between the zemindar and the raiyat was a matter of some difficulty and rules were laid down according to which the enhanced rent due to the landlord should bear the same proportion as the average prices during the last decennial period and a reduction to be made to cover the probable increase in the cost of production [Section 32(4)]. It is reasonable to allow the raiyat reduction of his rent for the reverse causes and this has been done in the Act [Section 38]. The Act puts a check on incessant enhancements. Whether the raiyat's rent be determined by a Court or by private agreement,

For rise in price of produce.

Struggle between land-lord and tenant for this unearned increment.

in either case it shall not be enhanced for fifteen years [Section 37]. The grounds on which a settled raiyat's rent may be enhanced have been modified and the enhancement of his rent by suit has certainly been facilitated, but on the other hand, the Act puts a strict limit to the amount of enhancement by contract [Section 29].

(m) The Act secures to the occupancy raiyat the power to make *improvements* and enables him to recover his outlay in case of eviction [Chapter X]. (h) It restricts subletting [Section 85].

(n) In payment and realisation of rent *instalments*, the Act, while leaving the number and dates of instalments to agreement or local usage, provides that an interval of not less than three months shall intervene between the institution of successive suits for arrears of rent [Section 147].

(o) The Act abolishes *ejectment* in execution of a decree for an *arrear of rent* against an occupancy raiyat and requires the decree-holder to bring the tenancy to sale [Section 65].

(p) The Act weakens the power of the landlord to use the process of *distrain* for purposes of simple oppression, though it remains as an instrument for the recovery of arrears [Chapter XII].

(q) The most important feature of the Act is the power it has conferred on the Government to direct the preparation of the *record of rights* in any local area, [Chapter X] which will enable both the landlords and the tenants to better understand the respective positions and so to avoid the possibility of future disputes between the parties. The framing of an authoritative record of the status of the tenant and of the rent payable by him will protect him against arbitrary eviction, excessive enhancement and illegal imposts and avert agrarian disputes.

Record of
rights.

Defects of
B. T. Act—

Against all these advantages, must be set some of its defects. It does not afford to the raiyat that effectual protection, which he was entitled to under the ancient law and custom and which to a large extent the Bill that was originally introduced into the Council intended to confer on him. It was the intention of Government to secure to the occupancy raiyat fixity of tenure, fair rent and right of free sale and to facilitate the acquisition of the status of a settled raiyat. In the Act however, though facilities have been given for the acquisition of the right of occupancy, the *fixity of tenure* of the occupancy raiyat has been *limited to the village alone*, his *initial rent left to competition*, and his *rent is changed from a practically fixed rent to an easily enhanceable one*. From the difficulty of proving the service of notice, from

Protection
not quite
effectual.

the defect of such notice, and from the difficulty of proving the prevailing rate or the increase in the value of the actual produce of the land, the landlord had only a nominal right of enhancement under the old law. But under the rule, in the present Act, of enhancement of rent for increase of prices of staple food crops, irrespective of the actual crops grown on the land, enhancement is easily obtainable. Thus, while the occupancy right may now be more easily acquired and proved, its real value has considerably been reduced.

And lastly, his right to sell his holding has been left wholly to custom. The B. T. Act contains no positive provision regarding the *transferability* of occupancy rights. A rapid increase of population has raised the demand for land, far in excess of the quantity available, and the occupancy raiyat's interest has gradually acquired a market value. About 80 years after the Permanent Settlement the custom of transferring the raiyats' holding had taken such deep root that Government found it practically impossible to ignore it. A provision was accordingly inserted in the Bengal Tenancy Bill which intended to give legal recognition to the custom, subject to a right of pre-emption in the landlord. It was, however, apprehended that the right of free transfer, if conferred on a thriftless peasantry, would inevitably lead to the transfer of the raiyats' land to the hands of the non-agricultural money-lenders—the Shylock-like *muhajans*, and reduce the *raiya*s to a class of landless tenants. It was, therefore, decided to abstain, at the time, from legislative interference and to wait till the custom has further strengthened itself. Since the passing of the B. T. Act, however, the custom has steadily grown and there is a strong feeling in the country that in order to enable the raiyat to tide over unavoidable financial strain, his credit should be enhanced by conferring on him the right of transfer over his holding. It has become imperative for Government to step in to regulate the custom that has been growing to safeguard the interest of the raiyat as well as the transferee. In Orissa they have already made such a provision. And in the newly constituted Presidency of Bengal, the Governor-in-Council has recently issued a Draft Bill in the lines of the Orissa Tenancy Act to recognise to a limited extent the custom of transferring occupancy holdings, which has steadily grown up every where in the Province.

Another chief defect of the Act is that the *classification* it has made of the tenants *does not exhaust all the interests in the land* that exist in the different parts of the country.

This has given rise to practical difficulties in dealing with tenant rights both in Bihar and in East Bengal, and the attempt made during the preparation of the records of rights to force each and every tenancy found there into one or other of the classes enumerated in the Act, has a disquieting effect upon the otherwise peaceful relationship that subsists between the landlord and the tenant.

No provision for periodic revision and maintenance of record of rights.

It is unfortunate that the Act has made no provision for the periodical *revision and permanent maintenance of the records* of rights which is essential for maintaining the cordial relationship between the landlord and tenant.

No sufficient protection against imposition of *abwabs*

The Act has not afforded to the raiyat sufficient protection against the *imposition of illegal cesses* by the landlord. The raiyats generally are so poor and so completely in the power of the landlords that they are still found constantly to acquiesce in the flagrant violation of their rights by their landlords for fear of *worse happening* to them, and it has become abundantly clear that further measures are required to protect those cultivators against the combined efforts of the landlords to abrogate the provisions of the Act.¹

Model rent legislation.

But inspite of these defects, it must be admitted that the Bengal Tenancy Act has for the most part succeeded in accomplishing the object it has in view and undoubtedly it may be accepted in many respects as the model of rent legislation in India which may very well be adopted by the other provinces for their own benefit.

PART II.

THE INCIDENTS OF OCCUPANCY RIGHT.

We now come to the second part of our discourse, *viz.* *the incidents of occupancy right.*

I propose to deal with the subject under the following heads :—(1) Who can acquire the right? (2) With respect to what class of land may the right be acquired? (3) How may the right be acquired? (4) What are the privileges and liabilities of the occupancy raiyat? (5) How may the right be lost or extinguished? Each of these will be dealt with in a separate chapter.

CHAPTER I.

WHIO CAN ACQUIRE THE RIGHT?

The first question that we propose to discuss is—*who can acquire the right of occupancy?* Who can acquire?

Broadly speaking, it is only the *raiya*s who can acquire the right. Raiyat only.

But the word '*raiya*' was not defined in Act X of 1859 nor in Bengal Act VIII of 1869. Since no definition of the term could be given, every case in which there was a doubt as to whether a particular tenancy is a tenure or a '*raiya*' holding had to be dealt with on its merits. For even the *vernacular names* of tenancies as to which there may be rulings of the High Court, are misleading. What is known as '*jote*' may be a tenure in one district, and a mere '*raiya*' holding in another; and so of '*taluks*,' and other venacular expressions. Who is raiyat?

The case-law as to the distinction between tennure-holders and raiyats before the passing of the Bengal Tenancy Act was uncertain and inconsistent, and was built up of isolated cases dealing with individual rights, which were the complement of the rights of other persons not before the court and therefore were not duly considered, and led to much profitless litigation.¹ The Rent Law Commission in their report pointed out :—"After the fullest consideration of the whole subject it appears to us impossible to discover Uncertainty of previous law.

¹ Finucane and Amir Ali's *Bengal Tenancy Act*, 1st Ed. 75.

Test of <i>raiyyati</i> holding.	any principle of distinction between raiyats and tennure-holders or under-tenure-holders, which will hold good universally or even in the large majority of cases. If <i>cultivation</i>
Cultivation.	be taken as the test, a <i>talukdar</i> , tenure-holder or under-tenure-holder, may cultivate land forming part of his <i>taluk</i> , tenure or under-tenure, while a person commonly called a <i>raiya</i> , may not himself cultivate a single square foot. It is impossible, therefore, to say that under all circumstances the person who cultivates is a <i>raiya</i> and the person who does not cultivate is a tenure-holder. If the <i>receipt of rent</i> from
Receipt of rent.	persons in the actual occupation of the land be considered the essence of a tenure-holder or under-tenure-holder, then we find <i>raiya</i> s also subletting and receiving rents from their tenants in actual occupation. If <i>hereditability</i> be tried, the <i>raiya</i> 's interest, the <i>raiya</i> 's holding is heritable as well as the <i>taluk</i> . Is <i>transferability</i> the test? The <i>raiya</i> s' 'jama' independently of Acts X of 1859 and VIII of 1869 (B.C.) is commonly transferable by custom. Is <i>saleability for its own arrears</i> to be set up as the true distinction? The landlord of his own option brings the <i>raiya</i> 's holding to sale in execution of decree for rent, while a tenure or under-tenure is not subject to the special law for the sale of under-tenure for the recovery of arrears of rent due in respect thereof, unless it is so saleable by title-deeds or established usage of the country. If the <i>quantity of rent</i> (paid?) by the tenant be supposed to be the point of distinction, then in Rungpore, the rent of a <i>jote</i> varies from one rupee to half a lakh of rupees, while in many districts the rent of many <i>taluks</i> is but a few rupees. It is true that the rent of tenure-holder or under-tenure-holder is not liable to <i>enhancement</i> upon the grounds applicable to a <i>raiya</i> having a right of occupancy; but this distinction stops here, for the existing law does not define the grounds upon which the rent of a tenure or under-tenure can be enhanced.
Hereditability. Transferability.	
Saleability for its own arrear.	
Amount of rent.	

Although at the present time and under the altered condition of agricultural society, *actual cultivation* is no longer the essence of a *raiyyati* tenure, we think the original conception of a '*raiya*' was that he *entered on the land for the purpose of cultivating it or bringing it under cultivation*, either by his own personal labour, or that of his servants or followers, or by means of persons who would occupy portions of land, giving him in return a share of the produce according to the custom of the country, and afterwards a money-rent, when it suited both parties to make this arrangement. A *raiyyati* holding being created in this manner, it did not cease to be such because the *raiya* subsequently sublet, (there

being nothing either in his contract or in the custom of the country to prevent him from doing so) and *practically converted himself into a middle-man*, which is only another name for a tenure-holder or under-tenure-holder. This process of conversion has long been going on in every district of Bengal. That while under-going this process there should be some doubt as to how far the tenant was to be governed by the incidents of the *raiya* condition which he is leaving, or by those of the tenure condition to which he is approaching is only natural.¹ It was held under the old law² :—(a) That if a person took land and at once sublet it he became a middleman (tenure-holder), and did not acquire occupancy rights in such lands³ (b) That if a raiyat who had acquired a right of occupancy in land sublet such land he did not thereby forfeit his right of occupancy⁴ (c) That such a raiyat could not by so doing alter the nature of his holding and alter it into an under-tenure”.⁵

Sub-letting
by raiyat—
effect on his
status.

In this state of the law as to the status of the raiyat the Bengal Tenancy Act describes a “*tenure holder*” as “primarily a person who has acquired a right to hold land for the purpose of *collecting rents or bringing it under cultivation by establishing tenants on it*,” and a *raiya* as “primarily a person who has acquired a right to hold land for the purpose of *cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners*,” and includes in both cases the successors in interest of persons who have acquired such a right.⁶ This definition only crystallises the previous case-laws on the subject and lays down that if a land is *acquired originally* for the purpose of *subletting*, the person acquiring would be a *tenure-holder*; but if it is *acquired originally* for the purpose of *cultivation* he would be a *raiya*, even though he *subsequently sublet*.

Definition in
B.T. Act.

In a case under the old Rent Law Field J pointed out :—“The only test of a *raiya* interest which can be applied in the present state of the law is, to see *in what condition the land was when the tenancy was created*. If raiyats were already in possession of the land, and the interest created was a right not to the *actual physical*

Test of a
raiya.

¹ Rent Law Commission Report, dated 29th June, 1880.

² *Ibid*, para 19. Field's *Digest*, page 38, Footnote (1).

³ *Ram v Lukhi*—1 W. R. 71; *Hurrah v Alexander*—Marsh, 479.

⁴ *Kali v Ram*—9 W. R. 344; *Haran v Mookta*—10 W. R. 113.

= 1 B. L. R. A. C. 81; *Jamir v Gonai*—12 W. R. 110

Koshal v Joynuddin—12 W. R. 451.

⁵ *Karu v Lachmipat*—7 W. R. 15; *Harihar v Jadunath*—7 W. R. 114.

⁶ Act VIII of 1885, S. 35 (2).

subsequent
subletting
does not
change
character of
raiyyat.

Original
grant deter-
mines cha-
racter of
tenancy.

possession of the land, but to collect the rents from those raiyats, that is not a *raiyyati* interest (but is a tenure). If, on the other hand, the land was jungle or uncultivated, or unoccupied, and the tenant was let into *physical possession* of the land, that would be a *raiyyati* interest (and not a tenure) ; and the nature of this interest so created would not, according to a number of decisions of this court, be altered by the subsequent fact of the tenant subletting to under-tenants".¹ Thus, as a general rule, the raiyats are the cultivating tenants, but they may not be cultivators at all themselves—they may cultivate their land by hired labour or by under-tenants² (or with the aid of partners). As observed in a later case:—"If the original grant was *raiyyati* any subsequent subletting could not take away the true character of the tenancy."³ The test laid down by Field J in the case already cited, however, as pointed out in a subsequent case⁴, is not exhaustive. A person may be a tenure-holder not only when he has a right to hold land for the purpose of collecting rent but also when he is let into possession of the land for the purpose of *bringing it into cultivation by establishing tenants* on it. So the mere fact that uncultivated lands are let out, would not necessarily shew that the person with whom the lands are settled is a *raiyyat*, because uncultivated lands may be let out for establishing tenants on them. Section 5 of the B. T. Act makes the point clear by the description it has given of the tenure-holder and of the raiyyat. The character of the tenancy is determined at the time of the original grant and Section 5 (2) B.T. Act shews that the right to hold the land for the purpose of cultivating it (in the case of a *raiyyat*) has reference to the *inception of the tenancy*. Where therefore, the original purpose for which the land was acquired is clearly shewn, a tenant, who *acquires land for his own cultivation and subsequently lets it out to under-raiyats*, would not lose the *raiyyati* right which he originally acquired and convert himself into a tenure-holder as between himself and his land-lord. And once the original grant is clearly shewn to be *raiyyati* by a lease unambiguous in its terms or by other evidence where there is no written lease, the mere fact that the tenant subsequently sublet the land would not alter the character of the tenancy.⁵ The surrounding circumstances and the subsequent conduct

¹ *Durga v. Kali*—9, C. L. R. 449.

² *Dhanpat v. Gooman*—W. R. Sp. Vol. (Act X) 61.

³ *Baidya v. Sudharam*—8 C. W. N. 751.

⁴ *Mednapur v. Sham*—15 C. W. N. 218.

⁵ *Pramoda v. Asiruddin*—15 C. W. N. 896 fd. in *Rajani v. Yusuf*—21 C.W.N. 188.

should be taken into consideration for determining the original purpose of the tenancy where the same is not clear.¹ But so far as regards under-tenants the character of the tenancy may be changed in that way.²

The B.T. Act has further laid down that in determining whether a tenant is a tenure-holder or a raiyat the court shall have regard to *local custom*. In one of the debates on this section Sir Stewart Bailey remarked :—“ We tell the court the first thing they are to look to is local custom ; but local custom may not always be sufficient to guide them, and then they have to ascertain what was the original object of the tenancy.”³

Ordinarily, a raiyat or cultivator in Bengal holds no more than a few *Bighas* of land, and the Act has therefore laid down as a *rebuttable presumption* of law that a tenant holding more than one hundred *Bighas* of land shall be presumed to be a tenure-holder and not a raiyat.⁴ But the law raises no converse presumption.⁵

Thus it is only the *raiya*t, as defined above, that can acquire the right of occupancy. But all raiya

ts, however, are not entitled to the privilege. In so far as Bengal and North Western Provinces are concerned, we have already seen that the Regulation Code of 1793 practically took away from the cultivator of the soil the privilege of occupancy which they had possessed and that Act X of 1859 restored to them, though partially, that privilege after the lapse of nearly sixty years and conferred on all raiya

ts—*Khudkasht* and *Paikasht* alike—the same privilege after their occupation of the same piece of land for the statutory period of twelve years. The B.T. Act has attempted to rehabilitate the ‘*Khudkasht*’ or ‘resident’ raiyat of the old Regulations under the name of the ‘*settled raiyat*’ and has given him enlarged means of acquiring the right of occupancy. The idea of the right of a ‘*settled raiyat*’ owes its origin to the right which was known to belong to the *Khudkasht* raiya

ts. But a *Khudkasht* raiyat might acquire the peculiar status by residence in the village. Recognition by the village-community was no doubt needed to make a new-comer into the village a *Khudkasht* raiyat, but residence in the village

¹ *Pramatha v. Nilmani*—15 C. W. N. 902. see also *Baidya v. Sudharam*—8 C. W. N. 751 : *Mrityunjoy v. Kenatulla*—5 C. L. J. 73.

² *Mahesh v. Madhuram*—6 C. L. J. 522

³ Selections from papers relating to B.T. Act, 483.

⁴ Act VIII of 1885, S. 5 (5).

⁵ *Tara v. Iswar*—14 C. L. J. 598=16 C. W. N. 398.

Residence in village if necessary.

was absolutely necessary to give him the status, though the period of his residence might be for much shorter period than twelve years. When Act X of 1859 was enacted, the village-community was not in existence in Bengal, and Act X did away with the element of residence in the village and adopted a prescriptive test of occupancy *viz.* twelve years' occupation, whether in the village or out of it. Under that Act (as well as Act VIII B.C. of 1869) it was necessary for the acquisition of the right of occupancy in land that the raiyat should have held the *same* land for twelve years, and if he took up fresh land in the village he had no right of occupancy in it until the lapse of a period of twelve years.¹

Who can be settled raiyat?

The Bengal Tenancy Act makes "every person" holding land "continuously as a raiyat for twelve years in any village, a settled raiyat of that village".² Whether the raiyat be *Khulkasht* or *Paikasht*, whether he resides in the village or not and recognised by the villagers as a member of their community or not, he becomes a '*settled raiyat*' of the village as soon as he completes the period of *twelve years in holding the land*, either himself or through his ancestors. He then acquires the right of occupancy in *all land for the time being held by him as a raiyat in that village*.³ All that is necessary is that he should hold land in a village, (i.e., included within the external boundaries of the village area), continuously for twelve years, though the *particular land* held by him may be *different at different times*.⁴ He thus acquires the right of occupancy in *any* land he holds, however short the period of occupation may be, not by occupation of, or payment of rent for, the *same* piece of land for a continuous period of twelve years.⁵ And every raiyat is presumed to be a "settled raiyat" until the contrary is proved.⁶ A raiyat is now entitled to add to his own occupation the period during which the holding was in possession of the person from whom he derives his title by inheritance.⁷ But the mere fact that a person has a occupancy holding in a village does not give him a right of occupancy in his other holdings in the same village unless he is also a settled raiyat there.⁸

When he acquires right.

¹ *Amar v Bukshi*—22 W.R. 228.

² Act VIII of 1885, S. 20 (1).

³ Act VIII of 1885, S. 21.

⁴ *Ibid*, S. 20 (2).

⁵ *Sarada Mitra's Land Law of Bengal*, 310.

⁶ Act VIII of 1885, 20 (7).

⁷ *Ibid*, 20 (3).

⁸ *Kuldip v Chatur*—3 C.L.J. 285.

Like the inchoate right of occupancy the inchoate Transferee. status of the settled raiyat is not transferable. When the status is complete, the raiyat acquires the right of occupancy as an incident of his status and though he may transfer his occupancy right, he may not by such transfer confer the status of a settled raiyat on the transferee. Thus a person purchasing an occupancy holding of a settled raiyat acquires occupancy right only in that holding; but he does not at once acquire occupancy right in any other land let to him, unless and until he had himself acquired the status of a settled raiyat.

Thus the privileges attached to the status of a settled raiyat are the same as regards the right of occupancy, as those possessed by the old *Khudkasht* raiyat, who, if he took up fresh land in the same village, held it on the same tenure as the old. In those times there was a large margin of waste lands in all villages, the resident cultivator had the fresh land at his door. There is now but little margin of waste in any village of the settled districts, and therefore the raiyat, if he wants to add to his holding, cannot always succeed in doing so. That he should, however, if successful in his quest, (and he can only succeed with the consent of his landlord) hold such additional land in the same status and by the same title, as his original holding, is only a rational development of the old customary law of the country to suit the modern wants.¹

If a person is a *tenure-holder* in respect of certain lands in a village, the fact that he is a settled raiyat of any particular land in the village will not give him the right of occupancy in the other lands which he holds, but if he holds the whole of the lands he holds in the village as a settled raiyat he acquires the right of occupancy in other lands which he holds a raiyat.²

A raiyat holding at fixed rates, cannot acquire the right of occupancy under the Bengal Tenancy Act.³ This was never the law before. Under the Old Regulations a *Khudkasht* raiyat could well have *Mokurrari* rights and he was protected from ejectment at revenue sales, although his rent could be enhanced up to the customary limit.⁴ Act X of 1859 and Act VIII of 1869 B.C. expressly divided occupancy raiyats into those at fixed rate and those not

¹ Amir Ali & Finucane's B.T. Act, 1st ed. 125.

² *Bujrangi v Mackenzie*—7 C.L.J. 475.

³ *Bhutnath v Surendra*—13 C.W.N. 1025=11 C.L.J. 98.

⁴ See *Ante*.

so¹ and the Revenue Sale law speaks of "*occupancy raiyats at fixed rates*."² The Bengal Tenancy Act does not affect any occupancy right acquired before its commencement,³ so that the raiyats-at-fixed-rates who had already acquired occupancy right before, will continue to retain it under the present Act. It may also be noted that a raiyat having the right of occupancy may subsequently acquire the status of a raiyat-at-fixed-rates, and in such a case his occupancy right will remain unaffected.⁴

Bhaoli
tenant.

The law makes no distinction between *rent in kind* and *rent in specie*. Hence whether the *raiya* pays in kind or cash he acquires a right of occupancy by twelve years possession. In some of the Districts of Behar (e.g. Gaya, Shahabad and Patna) the holding of land on produce rent, known as the *Bhaoli* system is a regular form of *tenancy*,⁵ and the raiyat in such cases acquires the right of occupancy.⁶

Bhagidar.

So a holding under a *Bhagdari tenure* (i.e. where also the *rent* consists of a portion of the produce) would establish a right of occupancy under the old law as under the present.⁷ But in other parts of the Province (e.g. East Bengal), where also the system of payment in kind prevails extensively, the local custom recognises in such cases *no right to the land in the cultivator*, but merely to a share of the produce raised by him. Thus the *Burgadar*, in the District of Pubna is ordinarily a cultivator who, under the terms of the contract, is a *servant or labourer under the holder of the land*. A settlement with a *Burgadar*, therefore, under which he undertakes to cultivate the land for half the share of the produce, the remaining half going to the owner, does not by itself create the relationship of landlord and tenant between the parties. Such is also the case with the *Bhagidar* or *Bhagchasis*, the *Adhidar* or *Adhiyar*. But there is nothing in the law which prevents any of these persons from acquiring, by terms of the contract between him and the person under whom he holds the land, the status of a raiyat, and in such a case he may as well acquire the occupancy right in the same way as other raiyats.

Burgadar.

Adhidar,
Adhiyar.

¹ See *Ante*.

² Act XI of 1859, S 37.

³ Act VIII of 1885, S. 19; *Ram v. Ram*—8 C.W.N. 860.

⁴ *Ramdhari v. Mackenzie*—10 C.W.N. 351.

⁵ Secretary to the Board of Revenue's Report on the working of B.T. Act, No. 419A, dated 30th April 1892, quoted in Rampini's B.T. Act, 4th Ed., p. 154.

⁶ *Jutto v. Basmutte*—15 W.R. 479.

⁷ *Hurreehur v. Bissessur*—6 W.R. (Act X) 17.

In a case of this description the essential point to be ascertained is the *status* of the person who actually cultivates the land. If the cultivator is a mere *servant or labourer employed by the holder* of the land, he is not a raiyat and cannot acquire the occupancy right, and a suit against him for the share of the crops deliverable by him, cannot be regarded as a suit for *rent*, but must be treated as one for *damages* cognizable by the Small Cause Court. On the other hand, if the cultivator is a *raiyat to whom the land was sublet*, the share of the crops which he undertakes to deliver to the lessor on account of the land cultivated by him, is "*rent*" within the meaning of S. 3 (5) of the Act, and on his failure to deliver the same a suit for the recovery of its money value will lie under the Rent Acts. This fundamental distinction was pointed out by the Calcutta High Court in the cases noted below¹ and if it is borne in mind it is not difficult to reconcile the cases in which apparently conflicting views appear to have been held². Thus where the defendants cultivated the land on *Bhag produce*, and having omitted to cultivate it in due course, the plaintiffs called upon them to quit the land, but they neither quitted it nor brought it under cultivation and then the plaintiffs brought a suit against the defendants laying the claim in respect of crops for four years, which was restricted to the one-half share, of the whole produce, which was explicitly described as the *malik's* share, these circumstances indicate that the plaintiffs had *treated the defendants as tenants*, and therefore, the defendants could in course of time acquire the right of occupancy in the land cultivated by them.³

When he is
raiyat.

An *under-raiyat* could, under the old law, acquire a *Under right of occupancy* in lands sublet to him otherwise than *raiyat*. for a term or from year to year;⁴ but ordinarily he could

¹ *Shyama v. Mahomed*—13 C. W. N. 835; *Kadi v. Ahad*—14 C. W. N. 629; see also *Lalji v. Barhamdeo*—16 C. W. N. 89; *Deb v. Ram*—19 C. W. N. 1205; *Nritto v. Rajendra*—22 Cal. 562. See *Imperial Gazetteer of India*, Vol. XXI, 237; *East Bengal District Gazetteer*, Rungpur, 114; *Fields Landholding*, &c. 706-708, 714. These authorities do not support the position that these persons always acquire the status of a raiyat, capable of acquiring occupancy right as seems to have been assumed by the learned Judges in 19 C. W. N. 1205.

² *Sreenath v. Diary*—*Sutherland's References from Mofussil Small Cause Court* 113; *Shama v. Rajani*—1 C. W. N. 55; *Kadi v. Ahad*—14 C. W. N. 629; *Lalji v. Barhamdeo*—16 C. W. N. 89; See *Luchman v. Hoolas*—11 W. R. 151=2 B. L. R. 27 App.; *Mullik v. Ukloo*—25 W. R. 140; *Jumunadas v. Garsee*—21 W. R. 124; Also *Tajuddin v. Ram*—1 All. 217.

³ *Lalji v. Barhamdeo*—16 C. W. N. 89.

⁴ Act X of 1859, S. 6.

not acquire the right as he generally held for a term or from year to year. The Bengal Tenancy Act, however, does not favour the acquisition of the right by under-raiyats, as it manifestly tends to take away from the raiyat with right of occupancy some portion of the privilege that the law confers upon him. The existence of the same sort of right in two persons holding the same piece of land, one claiming under the other, is in itself an anomaly, and whatever conflict of opinions there might have been under Act X of 1859 it may safely be said that under the Bengal Tenancy Act an under-raiyat can not acquire a right of occupancy.¹ Under-raiyats may however acquire the right by custom or usage. The custom or usage that an under-raiyat should, under certain circumstances, acquire a right of occupancy is not inconsistent with, and is not, expressly or by necessary implication, modified or abolished by, the provision of the Bengal Tenancy Act. The custom or usage, accordingly whenever it exists are not affected by the Act.² Reference has also been made in the Act to under-raiyats having or not having occupancy right.³

When can
acquire.

But a person who may have originally acquired a large tract of land, ostensibly with the object of cultivating it himself or by his servants or members of his family (*i.e.* a raiyat), may choose to abandon his position as a raiyat, underlet the holding to under-tenants, and be satisfied to take up the position of, and to *convert himself into, a rent-receiver, and to treat the under-tenants as raiyats* proper in every respect, namely, as persons entitled to acquire a right of occupancy and to hold the land against himself without being liable to ejectment. He may thus by his conduct give those persons, as against himself, the right to remain upon the land without being liable to be ejected at his instance which would preclude him from maintaining an action for ejectment against those persons.⁴

Firm.

Under the old law there was considerable difference of opinion as to whether an indigo concern or *firm* could acquire a right of occupancy. It was contended, on the one hand, that an indigo concern or firm *had no corporate or legal existence*, so far as the question of the right of occupancy was concerned, which could only be recognised in particular individuals, A firm of capitalists,

¹ Sarada Mitra's *Land Law of Bengal*, 308—309: *Akhil v. Hasan*—19 C.W.N. 246.

² Act VIII of 1885, S. 183, Illustration.

³ *Ibid*, S. 113 (1).

⁴ *Mahesh v. Manbhadra*—5 C.L.J. 522.

therefore, taking lease of lands from a zemindar and transferring their rights to the *changing members of the firm*, could not by any length of occupation acquire occupancy rights.¹ Further, it was urged that as the right could be acquired only by the raiyats, the *members of an indigo or tea concern i.e. an association of persons constituting a firm, who had a large capital, and who had devoted their energy to the improvement of the soil for the benefit of the country, as also for their own benefit, could not be said to be a raiyat.*² On the other hand, it was contended that there was nothing in the law to prevent the acquisition of the right by such an association.³ There was in fact no reason why a firm, cultivating indigo or tea, should not have the privilege of a *raiya*t, and a cultivating lease taken by it might very well be taken to be a *lease to individuals* who were, *at the time of the grant, members of the firm*, and if there was nothing to shew that the original grantees were no longer members of the partnership or concern or that they were dead or transferred their interests to other persons, it may acquire the right of occupancy in the land.⁴ The Bengal Tenancy Act has laid down that every person who holds land as a raiyat, acquires, under certain circumstances, the right of occupancy.⁵ The word '*person*,' as used here must be explained, according to the General Clauses Act applicable to all Acts passed by the Supreme Legislative Council, as including "any company or association or body of individuals, whether incorporated or not."⁶ This is also the meaning of the word according to the Bengal General Clauses Act applicable to Acts passed by the Bengal Legislative Council.⁷ It follows that an indigo or tea concern or firm, whether incorporated or not, is a '*person*,' and so capable of holding land. If a *firm* cultivating indigo or tea *continues to have the same members and to occupy the same piece or pieces of land, or hold land in the same village for more than twelve years*, the cultivation of lands being carried on by the servants of the firm or its subtenants, it may acquire the occupancy right, which the law has created for the benefit of the cultivators. For the law does not require that a person, in order to acquire the right, should be a *bonafide cultivator*. An indigo

¹ *Canan v. Kailash*—25 W.R. 117.

² *Raikomul v. Laidley*—4 Cal. 957.

³ *Sarada Mitra's Land Law of Bengal*, 311.

⁴ *Laidley v. Gour*—11 Cal. 501 Explained in *Bajrangji v. Mackenzie*—7 C.L.J. 475.

⁵ Act VIII of 1885, S. 20.

⁶ Act X of 1897.

⁷ Act I of 1889 B.C. S2 (32).

or tea-cultivating firm would not fall under the definition of tenure-holder, because its purpose is not to collect rent or to bring the land under cultivation by establishing tenants on it, but it may fall under the definition of raiyat, because its object is to cultivate the land by hired servants.¹ But though an indigo or other firm may technically fall under the definition of a raiyat, we must not forget that we must have regard to local custom to determine whether a tenant is a tenure holder or a raiyat,² and an indigo-planter or firm of a similar nature will hardly be considered as a raiyat in the general acceptance of the country.

16 annas
landlord,

It is wrong in principle to allow a *landlord* to have the benefit of the right which the law intended to confer only on the raiyats. The landlord, therefore, himself cannot, by cultivating his own land, even if he were to use the name of a stranger as holding the land, (i.e. *Benami*) acquire the right of occupancy in the land so cultivated by him. A man cannot occupy the double character of landlord and raiyat and acquire the statutory right on the pretence of paying rent to himself.⁴

Co-sharer
Landlord.

A *co-sharer* out of a body of landlords cannot acquire right by holding and cultivating the land and paying the proportionate share of the rent to the other co-sharers. Nor can he do so by holding land with the permission of the other joint owners who hold other lands by arrangement.⁵ Even when an occupancy right being acquired by a co-share landlord, is by the operation of S. 22 (2) B. T. Act. extinguished, a new occupancy right cannot be acquired in the same tenancy by the co-sharer proprietor by whose act the occupancy right has ceased to exist.

Rent Farmer
e.g. *Ijaradar*,
etc.

An *ijaradar* or farmer of rent (whether he is known as a *ticcadar*, *halkinadar* or *mus'ajir*) shall not, while so holding, acquire by purchase or otherwise, a right of occupancy in any land comprised in his *ijara* or firm.⁶

If at the date of the grant of a permanent interest there was no occupancy right which had matured, an occupancy right cannot be acquired after the date of the grant.⁷

¹ Act VIII of 1885, S. 5 (2).

² Ibid (4). See *Ante* p. 111.

³ *Reed v. Srikishen*—15 W.R. 430: *Radha v. Rakhal*—12 Cal. 82.

⁴ *Kissen v. Raja* (unreported) cited in 10 Cal. 45=12 C.L.R. 559. See also *Raghubans v. Bishen*—2 W.R. (Act X) 92.

⁵ *Ram v. Bhela*—37 Cal. 709.

⁶ Act VIII of 1885 as amended by Act I of 1907 B.C. S 22 (3).

⁷ *Akhil v. Tripura*—29 Ind. Cas. 563.

The same rule applies to a person occupying land as *Landlord's assignee* of the zemindar and cultivating, because of the *assignee, middleman, opportunity thus afforded to him,*¹ to a *middleman,*² to a *mustagir, lessee, such a mustagir or thicadar,*³ to a mortgagee holding *thicadar, under zur-i-peshgi lease. Such leases are not mere contracts Zuripeshgi lessee.* for the cultivation of land let, but are also intended to constitute a real and valid security to the tenant for the principal sums which he had advanced and interest thereon. The tenants' possession under them is in part at least not that of a cultivator only but that of creditor operating repayment of the debt due to them by means of their security. Where a lease is not a mere contract for the cultivation of the land let, but is also intended to constitute, and does constitute, a real and valid security to the tenant for the sum advanced, it can not be made the foundation of a claim to a *raiya* interest.⁴

A *raiya* by taking a *zurpeshgi* lease of land of which he was previously or then put in possession as a *raiya* does not lose his *raiya* status and divest himself of his right to acquire a right of occupancy in the land⁵.

It will be seen that an occupancy right can be acquired *Transferee.* by *purchase* if the right is transferable by custom or local usage. If the right is not so transferable the purchaser can acquire the right if he purchase it with the consent of the landlord, or if the landlord recognise him as the tenant in occupation of the holding in place of the original tenant.

A person possessing or cultivating land as a *trespasser* *Trespasser.* can not acquire a right or occupancy⁶. If he declined to have the position of a *raiya* paying rent, and held the land either stealthily or by setting the landlord in defiance, his wrongful possession would give him no right as a *raiya*.⁷ Nor can possession obtained and continued through fraud create any right of occupancy.⁸

¹ *Wooma v. Kundan*—19 W. R. 177.

² *Gopimohan v. Shib*—1 W. R. 68.

³ *Ram v. Veryogi*—25 W. R. 554: *Issur v. Bhuka*—17 W. R. 242
Thomas v. Panchanan—25 W. R. 503.

⁴ *Bengal Indigo Co. v. Raghobar*—24 Cal. 272=L. R. 23 I. A. 758=
1 C. W. N. 83. *Lal v. Mackenzie*—19 C. W. N. 229.

⁵ *Ramdhari v. Mackenzie*—10 C. W. N. 351.

⁶ *Peer v. Meajan*—W. R. (Sp) F. B. 146: *Gureeb v. Bhuban*—2 W. R. (Act X) 85: *Golam v. Poorno*—3 W. R. (Act X) 147. *Bhoobanjay v. Ram*—9 W. R. 449: *Ishan v. Harish*—18 W. R. 19=10 B. L. R. App. 5. *Dabee v. Mungar*—2 C. L. R. 208: *Satyabhama v. Krishna*—6 Cal. 55: *Ishan v. Shama*—10 Cal. 41: *Hara v. Ram*—14 Cal. 67:

⁷ *Wooma v. Kishoree*—8 W. R. 238: *Bhubanjay v. Ram*—9 W. R. 449. *Ishan v. Hurish*—15 W. R. 19: *Kalee v. Shashonee*—25 W. R. 42.

⁸ *Ibid.*

Servant. *Permissive possession*, or possession by a servant as such is not that of a raiyat, and cannot confer the right.¹

Licensee. There is a well established distinction between a *lessee* and a *licensee*. The cardinal distinction is that in the case of a *lease* there is a *transfer of interest in land*, whereas in the case of a *license*, there is no transfer of interest, although the licensee acquires the right to occupy the land.² A mere *licensee*, therefore, whose possession is of a permissive character not founded upon any right³ or who happened to be in occupation of land for twelve years, could not, under the old law, nor can he under the present Act, claim the right.⁴

¹ *Wooma v. Bakoo*—13 W. R. 333. *Mohun v. Ram*—21 W. R. 400.

² *Secretary v. Karuna*—35 Cal. 82; *Mohipal v. Lalji*—17 C. W. N. 166.

³ *Mohar v. Ram*—21 W. R. 400; *Addoyto v. Peter*—17 W. R. 383.

⁴ *Uma v. Bokoo*—13 W. R. 333.

CHAPTER II.

IN WHAT LANDS CAN THE RIGHT BE ACQUIRED?

We now proceed to consider the question with respect In what
to *what classes of land the right of occupancy can be* land?
acquired.

Land must be held for *agricultural* or *horticultural* Land used for
purposes, otherwise no right of occupancy can be acquired. Agricultural
As pointed out by Phear J in a case arising under Act X of Horticultural
1859:—"The occupation intended to be protected under purposes or
(Section 6 of that Act) is occupation of land considered incidental
as the subject of *agricultural* or *horticultural cultivation* thereto.
and used for the purposes incidental thereto, such as the site
of the homestead, the raiyat's or *mali's* dwelling house and
so on. I do not think that it includes occupation the main
object of which is (non-agricultural or non-horticultural
e.g.) the dwelling house itself, and where the cultivation of
the soil, if any there be, is entirely subordinate to that."¹
And it has been held in all the later cases that there can
be no right of occupancy in land used mainly for any but
agricultural or horticultural purposes².

The term '*agriculture*' is of wider import than the term Agricultural
'*cultivation*.' It is pointed out in the Oxford Dictionary that
'*agriculture* means the science or art of cultivating the soil
including the allied pursuits of gathering in the crops and
rearing live stock, tillage, husbandry, farming (in the widest
sense); "*Cultivation*," on the other hand, is defined as mean-
ing the tilling of land, tillage, husbandry. It is obvious,
therefore, that '*agriculture*' has a much wider import than
'*cultivation*. Consequently, a purpose may be connected
with agriculture but not necessarily ancillary to cultivation.'³

Horticulture means the cultivation of a garden or the Horticultural
science of cultivating or managing garden, including growing
flowers, fruits and vegetables.⁴ Where land has been let
out for horticultural purposes, and the lessee held the land
for the statutory period as an *orchard*, he acquired an occu-
pancy right therein under the old law,⁵ and the present Act

¹ *Kalee v. Jankee*—8 W. R. 250.

² *Saradn Mitra's Land Law of Bengal*, 315—316.

³ *Hedayet v. Kamalananda*—17 C. L. J. 411.

⁴ *Ibid* also *Chowdhry v. Gour*—2 W. R. (Act X) 40: *Kalee v. Janki*—
8 W. R. 250.

⁵ *Harry v. Nursing*—21 Cal. 129: *Umrao v. Mahomed*—4 C. W. N.
76—27 Cal. 405.

does not seem to have made any variation in this rule, especially as there is nothing in its definition of *raiya*t which excludes a person who has taken land for horticultural purposes. Where a *tenant* of land *has the right to bring it under cultivation* he shall be deemed to have acquired the right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of *gathering the produce* of it.¹ But if the lease was for the purpose of gathering fruits from the trees on the land, it can not be affirmed that the lease was for horticultural purposes.²

Building.

Bastu.

Old Law.

Thus, under the old law, no right of occupancy could be acquired in land *used for building* purposes³ or of which the main object of occupation was the dwelling house.⁴ But if a piece of land was *used* by the cultivator *for his own habitation* and it was *part of his entire agricultural holding*, he could acquire a right of occupancy in it with the rest of the land in the holding.⁵ But if the homestead land did not form part of an agricultural holding, he had no right of occupancy as the rent law did not apply. It was decided that where the *principal subject* of the entire occupation was *bastu* land and the residue, if any, of the holding being entirely *subordinate*, it could not be said that the homestead land was part of the *raiya*ti holding; but it was otherwise, where the *principal subject* was agricultural land, the building being *accessory* thereto.⁶

Under B. T. Act.

Bastu held—
(a) As part
of *jote*. -

(b) As
distinct from
jote.

Now, under the Bengal Tenancy Act, where the *bastu* land is held by a *raiya*t *with and as part of* his arable holding, the ordinary provisions of the Act will apply to his *bastu* and he may acquire a right of occupancy in his *bastu* in the same way as he acquires the same in the cultivated portion. Even if the *bastu* land is held by a *raiya*t as a *distinct holding apart from* the cultivable land held by him, the incidents of his *bastu* are to be regulated, in the absence of any local custom or usage, by the provisions of the Act applicable to land held by a *raiya*t and he may acquire a right of occupancy in his *bastu* as well. Thus, provided a tenant is a *raiya*l he may acquire a right of occupancy in his homestead land, whether it be held as part of his

Act VIII of 1885, S 5 (2) *Explanation*.

Hedayet v. Kamalanand—17 C. L. J. 411.

Sarna v. Blumhardt—9 W. R. 552. *Mohar v. Ram*—21 W. R. 400.

Kalee v. Janki—8 W. R. 250.

Pagose v. Rajoo—22 W. R. 591; *Mohesh v. Bishonath*—24 W. R. 402.

Chandessari v. Ghenah—25 W. R. 152.

agricultural holding or not unless there be a local custom or usage to the contrary.¹ Even a tenant who is *not a raiyat in respect of a piece of bastu or homestead land but is so in respect of the agricultural land* which he holds in the village, and the homestead land is held "otherwise than as part of the tenant's holding as a raiyat," must be regarded, in the absence of any allegation of local custom or usage, as holding the homestead land in accordance with the provisions of the Bengal Tenancy Act applicable to land held by a raiyat; such a tenant has, under section 21 of the Act, a right of occupancy in the piece of homestead or *bastu* land as well as in the agricultural land in the village of which he is a settled raiyat; or, in other words, if a raiyat holding *jotes* with occupancy rights in a village, holds *bastu* land in the same village, *not as a raiyat, but separately from his raiyati holding*, he would, in the absence of a local custom to the contrary, have a right of occupancy in the homestead also.² If the *homestead is under one landlord and the jote under another but in the same village*, S 182 B. T. Act applies and he acquires the right of occupancy in the homestead as well.³ The provisions of the Act are applicable also to the homestead of a person who is a raiyat, although he is *not a raiyat of the village in which the homestead land is situated, and is not a raiyat of the same landlord as the landlord of the homestead land, or, in other words, although he does not hold his homestead under the same landlord under whom he holds his holding and although his holding may be in a different village from that in which his homestead is situate*.⁴ That is to say, the homestead and the *raiayati* need not be in the *same village* or under the same landlord, and S 182 applies even when both are different.⁵ Thus provided a tenant is a raiyat, he may acquire a right of occupancy in his homestead land whether it be held as part of his agricultural holding or not, unless there be a local custom or usage to the contrary,⁶ and this is so whether he is a raiyat of the same village in which the homestead is situated or not, and whether he is a raiyat of the same landlord as the landlord of the homestead land or

(c) Tenant not raiyat in respect of *bastu*.

(d) *Bastu* and *jote* under different landlords.

(e) *Bastu* and *jote* in different villages.

¹ Act VIII of 1885, S 182, Rampini's 3rd Ed. Notes 570.

² *Golam v. Abdul*—13 C. L. J. 255.

³ *Protap v. Biseswar*—9 C. W. N. 416.

⁴ *Harihar v. Dinu*—14 C. L. J. 170=16 C. W. N. 536 *fg.* *Kripa v. Seikh*—4 C. L. J. 332=10 C. W. N. 944. Referred to in *Protap v. Biseswar*—9 C. W. N. 416: *Krishna v. Jadu*—21 C. L. J. 475: *Dinu v. Sashi*—22 C. L. J. 221.

⁵ *Kripa v. Sheikh*—4 C. L. J. 332=10 C. W. N. 944 *fd.* in *Harihar v. Dinu*—14 C. L. J. 170. But See: *Kuldip v. Cheatur*.—3 C. L. J. 285.

⁶ *Rakhal v. Dina*—16 Cal. 652.

(f) *Bastu*
sublet.

not. But where he is a raiyat of a different village he cannot acquire the right of occupancy then and there but must hold the *bastu* continuously for a period of twelve years and thereby acquire the status of the settled raiyat of the village.¹ Even where the holding of a raiyat consists partly of agricultural and partly of homestead land, and he let out the homestead portion of his holding, although that portion is not agricultural, the incidents of the sublease would be governed by the provisions of the B. T. Act having regard to the nature of the original tenancy of the raiyat and not by the Transfer of Property Act. The sublessee is, therefore, an *under-raiyat* under the B. T. Act, and, if he holds land as a settled raiyat even though not under the same but under a different landlord and in a different village contiguous to his homestead, he *acquires a right of occupancy in the homestead* under the provisions of S 20 taken with S 182 B. T. Act, though he has only the interest of an *under-raiyat* with respect to it. For the provisions of the Act applicable to *land held by a raiyat* shall regulate the incidents of the tenancy of the homestead. This seems to be anomalous.² *Homestead* here denotes land which is actually used by the raiyat for residential purposes and it is not sufficient that its character is such as would justify its use as homestead.¹

Arhat, Ghat,
Basar,
Factory,
Manufactory
Coal depôt,
Mine, etc.

Similarly, no right of occupancy can be acquired in land used for *Arhats, Ghats, Bazars*, Indigo factories, manufactories³ coal depôts⁴ mines⁵ or quarries.⁶ At the same time, the original purpose of the tenancy should be kept in view. And although a raiyat, who had taken a lease of land for cultivating purposes, might afterwards convert it into the site for a shop and receive the profits from the shopkeepers, he might yet acquire a right of occupancy therein under the old law⁷ as he can do under the present.

Jalkar,
fishery, tank.

The right cannot be acquired in *jalkar* or *fisheries* or *tank*, when they are not *appurtenant* to land acquired or

¹ *Dina v. Sazhi*—20 O. W. N. 550=22 C. L. J. 219. *Bhikhari v. Maharaj*—43 Cal. 195.

² *Krishna v. Jadu*—21 C. L. J. 475=28 Ind. Cas. 839=19 O. W. N. 914.

³ *Sarada Mitra's Land Law of Bengal*, 316.

⁴ *Ranigunj v. Jadu*—19 Cal. 489.

⁵ *Jadunath v. Schœne*—9 Cal. 671.

⁶ *Amir Ali-Finucanes' B.T. Act*. 2nd Ed. 59.

⁷ *Khajurunnuissa v. Ahmed*—11 W. R. 88. *Mohar v. Ram*—21 W. R. 400.

held for cultivation¹. But where land was let for cultivation and there was a *tank* on it, the water of the tank being used for domestic purposes or for irrigation or preparation of jute or similar other crops, the *tank* would go with the land *as part of the agricultural holding*, and if there was a right of occupancy in the land there would be a right of occupancy in the tank as appurtenant to the land; but where the tank was the principal subject of the lease, and only so much of the land passed with the tank as was necessary for it, namely for the banks, there could not be any right of occupancy in it², as tank used only for the rearing and preservation of fish, when it is not a part of the agricultural holding³. The test to be applied is whether the grant is subsidiary to agricultural pursuits, or it is merely for the purpose of rearing and catching fish⁴.

A land may be used for the grazing of cattle required for agricultural pursuits or it may be used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding is used for agricultural purpose and a right of occupancy may be acquired therein⁵. Thus, in order that the occupancy right may be acquired in *pasture land* it is necessary to prove that the *grazing was in relation to cultivation*, which is the primary purpose for which a raiyat acquires the right to hold land. If, as a matter of fact, the grazing was in relation to agriculture and if immediately or shortly after the lease had been granted, the tenant grazed cattle on the land as subsidiary to agricultural pursuits, the inference would legitimately follow that the lease was for agricultural purposes and was granted for the purpose subordinate to that of cultivation. If that is established, the tenant may very well claim to have acquired the status of an occupancy raiyat⁶. But a tenant can not acquire a right of occupancy merely by the use of the

¹ *Juggobundhu v. Promotho*—4 Cal. 767; *Bollye v. Akram*—4 Cal. 761; *Sham v. Court*—23 W. R. 432. *Wooma v. Gopal*—2 W. R. (Act X) 19; *Siboo v. Gopal*—19 W. R. 200; *Nidhi v. Ram*—20 W. R. 341; *Jardine v. Surut*—3 C. L. R. 140; *Uma v. Mani*—8 C. W. N. 192; *Mahananda v. Mangala*—34 Cal. 987—8 C. W. N. 804.

² *Ibid* and *Sham v. Court* 23 W. R. 432; *Juggobandhu v. Promotho*—4 Cal. 767; *Bollye v. Akram*—4 Cal. 961.

³ Act VIII of 1885, S. 193.

⁴ *Hedayet v. Kamalanand*—16 C. L. J. 411—14 C. W. N. 872.

⁵ *Brojobashi v. Ram*—23 C. L. J. 638; *Fitz-Patrick v. Wallace*—11 W. R. 231 followed in *Latifar v. Forbes*—14 C. W. W. 372.

⁶ *Hedayet v. Kamalanand*—16 C. L. J. 411—14 C. W. N. 872.

pasture land of his landlord if he does not pay rent for the same, though he may acquire a right in the nature of an easement¹.

Land taken to gather and store crops. The *gathering and storage of crops* raised by a raiyat is clearly a purpose auxiliary to cultivation, and when land has been let out for a purpose like this, the provisions of the Bengal Tenancy Act apply, and the lessee becomes a *raiya*t in respect thereof. In such a case the right of occupancy can be acquired in such land².

Utbandi land.
Under old Law. In case of the *utbandi tenancy*, by which the raiyat holds a certain area of land, but for which he pays rent according to the quantity of the land which he cultivates year by year, the rent varying according to the cultivated area, under the Acts of 1859 and 1869 if the raiyat paid rent for the period he could cultivate, and did not pay when he could not cultivate, or paid only for as much land as he could cultivate in any year, the holding and cultivation for more than twelve years, though discontinuous, gave him a right of occupancy³.

Under B. T. Act. The Bengal Tenancy Act has made material alteration of the law upon this point. In this respect *utbandi* land is dealt with in the Act differently from ordinarily *raiya*t land, in which, by section 21, a settled raiyat has a right of occupancy, no matter how short a time he has held it. Section 180 of the Bengal Tenancy Act prohibits the acquisition of an occupancy right in land ordinarily let under the custom of *utbandi* until that particular land has been held for twelve years continuously⁴. A right of occupancy, therefore, cannot be gained in a piece of land held on the system, if the possession of the land has not been continuous, though it may have commenced more than twelve years previously. Section 19 of the Act, however makes an exception in favour of the right acquired before the commencement of the Act, by operation of any enactment, custom or otherwise.

Char or Diara land. In the case of *Char* (which means a sand bank formed in a river or which accreted to its bank) and *Diara* (which means an island formed in the bed of river)⁵ lands which are always under the risk being of diluviated and sometimes

¹ Sarada Mitra's *Land Law of Bengal*, 318.

² *Dina v. Sashi*—22 C. L. J. 219.

³ *Dwarka v. Naboo*—14 W. R. 193; See also *Premananda v. Surendra*—20 W. R. 329.

⁴ *Beni v. Bhuban*—17 Cal. 393.

⁵ *Wilson's Glossary*.

unculturable, the law has provided that the mere fact of occupation of such lands as a raiyat by a settled raiyat is not sufficient to create any right of occupancy in them. They must also be held 'for twelve continuous years' before the right can be accrued. *Char* or *Diara* land may, however, in due course of time be so permanent in character that the Collector of the District may declare that they have ceased to be *Char* or *Diara* land and then a raiyat may acquire the right of occupancy in them in the same way as in any other land¹.

He has the same right in any land which has accreted to his *jote* as he has in his original holding; and when a raiyat has occupancy right in a *jote*, he is entitled to hold such accreted lands as an increment to that *jote*², and with right of occupancy in it; but where there is no pre-existing right to the land of an occupancy raiyat no such right is annexed to the accretion to it³.

The right of occupancy can not ordinarily be acquired in land held by the proprietor of an estate as his *private land*, known in Bengal as *khamar*, *Nij*, or *Nij-jote*, in Behar as *Zirai*, *Nij*, *Sir*, or *Kamat*, and in Orissa as *Majhas* and by other names⁴. There is a distinction long and deeply ingrained in the mind of the agricultural population of Bengal—the distinction between that portion of the land which, under whatever circumstances it is acquired or appropriated, and by whatever denomination it is known, whether as *Sir*, *khamar*, or *Zirat*, was recognised as being in a special and exclusive sense the private property of the Zemindar, as distinguished from all the rest of the cultivated or cultivable area, which may be called *raiya* land, and in respect of which the Zemindar's rights are merely to receive a share of the produce or its equivalent in money⁵. Having regard to the efforts made by landlords in some parts of the country, under the existing law, to get into their own hands as large an amount of the *raiya* land as possible and convert it into *khamar* land, it has been thought necessary to make it clear that the existing stock of *khamar* lands can not hereafter be increased and that all land which is not *khamar* shall be

Accretion.

Proprietor's, private land.

Distinction between *raiya* and non-*raiya* lands.

¹ Act VIII of 1885, S. 180.

² *Gourhari v. Bholi*—21 Cal. 233; *Gobindmani v. Dinobandhu*—15 W. R. 87; *Alimoolah v. Shaheboolla*—15 W. R. 149; *Bhagabat v. Deergbijoy*—16 W. R. 95=8 B. L. R. 73; *Finlay v. Gopes*—24 W. R. 404 not followed.

³ *Beni v. Chaturi*—33 Cal. 444=4 C. L. J. 63.

⁴ Act VIII of 1885, S. 116.

⁵ *Selection from the Record of Government of Bengal*, 52—53.

deemed to be *raiyati* land and that all land shall be presumed to be *raiyati* land till the contrary is proved ¹. These lands were let out occasionally on rent in specie, but more generally at half the produce or even a smaller share. The letting, in fact, did not, according to ancient theory, create the relationship of landlord and tenant between the proprietor and cultivator, neither did it create in favour of the latter any interest in the land so let out. It was really cultivation by hired labour, a share of the produce being taken by the labourer as remuneration or wages ². The principle of the Rent Acts of 1859, 1869 and 1885 is that the proprietor is entitled to hold and cultivate such land by hired labour in any year he pleases. The mere occupation for a number of years by a raiyat does not make the land *raiyati* and deprive the landlord of the right of re-entry at the end of any agricultural year. The raiyat cannot acquire a right of occupancy or even the status of a non-occupancy raiyat simply by occupation and payment of rent, as he may with respect to ordinary *raiyati* lands ³. But notwithstanding that a piece of land was originally the private land of the proprietor, he may by his conduct, waive his right to hold it as *non-raiyati* and make it *raiyati* ⁴. The Rent Acts provide that if any such land has been held *under a lease for a term of years or from year to year* the raiyat does not acquire therein the right of occupancy ⁵, but if such land be let out to a raiyat but not for a term of years or from year to year, it is impressed with the character of ordinary *raiyati* land and occupancy rights could be acquired in it by twelve years' continuous possession ⁶. The acquisition of occupancy right by a tenant in an alleged *kamat* or *zirat* land cannot be prevented, unless the landlord proves that when the holding was first created it was held under a lease for a term or from year to year. If it was not so initially let out, the execution of a *kabuliyat* for a term by the tenant during the continuance of the tenancy does not affect his status or bar the application of the provisions Chapter V.⁷ A tenant of *kamat* lands

¹ *Ibid*, 189; See *Ajodhya v Ram*—13 C. W. N. 661; *Herbert v Chatter*—13 C. W. N. 664.

² *Sarada Mitra's Land Law of Bengal*, 321.

³ *Ibid*, 322—323; Act VIII of 1885, S. 116.

⁴ *Ibid*, 323.

⁵ Act X of 1859, S. 6; Act VIII B.C. 1869; Act VIII of 1885, S. 116. See also *Bhugwan v. Jugmohan*—20 W. R. 808; *Ashraf v. Ram*—23 W. R. 288;—*Damodar v. Dalglish*—13 C. L. J. 512 P. C.

⁶ *Gourharee v. Biharee*—12 W. R. 278;—3 B. L. R. App. 188. See also *Rafiuddin v. Iswar*—17 C. L. J. 585; *Denonath v. Meghu*—5 C. L. J. 181.

⁷ *Masudan v. Gudar*—1 C. L. J. 456.

does not acquire a right of occupancy by holding it over after the expiry of his lease ¹. Unless the proprietor takes the precaution indicated by the concluding words of Section 116 of the Bengal Tenancy Act, that is, "when any such land is held under a lease for a term of years or under a lease from year to year", or in other words, he lets it out for a term, he cannot prevent the accrual of the occupancy right in such land.

The Bengal Tenancy Act provides for the private lands ^{Tenure-holder's private lands.} of the *proprietors* only, *i.e.*, of persons owning an estate or part of an estate ². It may, therefore, appear that the right to have *khamar* lands belongs only to proprietors within the meaning of the Act, and that *tenure-holders such as Patnidars or Ijardars*, as such, can have no such right ³. But it may be pointed out that the Rent Acts of 1859 and 1869 spoke of "proprietors of an estate or *tenure*" and they evidently meant tenure-holders who succeeded in obtaining leases of the entire villages including *raiya* as well as *non-raiya* lands *e.g.* *Patnidars, Ijardars, Thiccadars*. The character of a piece of land should not change by the mere transfer by the proprietor of his right by way of a *Patni* or other leases of similar nature. And we are not justified in concluding that only persons who are 'proprietors' within the meaning of the Bengal Tenancy Act are entitled to have private lands ⁴. If, therefore, a tenure-holder has private lands the rules governing the accrual of occupancy right in such lands of the Zemindar govern, and if he has not, or in other words, such lands become, on the grant of the lease, *raiya* lands, occupancy right will arise therein in a way similar to that in which such right arises in ordinary *raiya* lands.

Service tenures (*Chakaran*) are found in some parts of the country, being a remnant of the old system under which public officers and the servants of the village were paid by grants in land instead of by money salaries. Somewhat similar are the *Ghatwali* tenures of Beerbhum and elsewhere, originally granted for keeping mountain passes against the Maharatta and other invaders ⁵. Regarding them it should be noted that a service tenure created for the *performance of services private or personal to the Zemindar*, may be

Service tenures—*Ghatwali Chowkidari Chakaran.*

Distinction between public and private.

¹ *Kalihar v. Rupan*—12 C. W. N. 439.

² Act VIII of 1885, S. 8(2).

³ Rempini's *Bengal Tenancy Act*, 4th Edition, 403: Finucane and Amir Ali's *Bengal Tenancy Act*, 1st Edition, 457.

⁴ Sarada Mitra's *Land Law of Bengal*, 324.

⁵ Field's *Introduction to Regulations* 40—41.

resumed by Zemindar, when the services are no longer required or the grantee refuses to perform them. In such a case the holding of land for service, though the service may be called rent in the broad sense of the word, creates no right of occupancy or any other statutory right recognised by the law¹. But when the grant is *for services of a public nature*, in other words, when *lands are held upon a grant subject to a burden of service* and not merely in lieu of wages, so long as the holder—the grantee—is able and willing to perform the services, the zemindar has no right to put an end to the tenure whether the services are required or not². But where the holder refuses to perform those services, the consideration for his being allowed to continue in possession will wholly fail and he will be liable to be ejected, however long he may have held the land³.

Under old
Law.

Having regard to the language of Section 6 of Act X of 1859, it was held that a right of occupancy might be acquired even in *Chaukidari chakaran* lands by tenants who had cultivated or held such lands for twelve years, and this conclusion is not affected, even if we assume that the tenants were originally merely tenants-at-will⁴. But the judgment in that case was based on the law as to the acquisition of the right of occupancy as it stood under Act X, uncontrolled in any way by any consideration of the incidents which are peculiar to the service tenures.

Under B. T.
Act.

The Bengal Tenancy Act does not lay down any rule of law with respect to the acquisition of occupancy right in lands held under the service tenure, but it has expressly provided that nothing in it shall *affect any incident* of a service tenure⁵. These incidents however are nowhere specified. That the acquisition of a right of occupancy by a raiyat takes away a considerable portion of the interest of the tenure-holder in the land cannot be denied. The right is *permanent* in its character and the interest created is *substantial*. When the next *Ghatwal* takes possession after his appointment, if he is to take the land subject to the right of occupancy of the raiyat he has not all that he would otherwise be entitled to as a *Ghatwal*.

¹ *Radha v. Badhu*—22 Cal., 928; *Bhimapaiya v. Ram*—22 Bom., 422; *Ansar v. Grey*—2 C.L.J. 403.

² *Venkata v. Sobhandri*—10 C.W.N. 161; 2 C.L.J. 1 P.C. following *Leelanund v. Munoorunjun*—13 B.L.R. 124; L.R.I.A. Sup. 181.

³ *Hurrogobind v. Ramratno*—4 Cal. 67.

⁴ *Ram v. Ram*—31 Cal., 1021 referring to *Thacoorani Dass's case*—B.L.R. Sup. 202=3 W. R. (Act X.) 29; *Hyder v. Bhoopendra*—15 W. R. 231 followed in *Rakhaldas v. Madhab*—13 C.L. J. 109=15 C.W.N. 109.

⁵ Act VIII of 1885, S. 181.

The act of the previous *Ghatwal* in not cultivating the land himself, either from incapacity or unwillingness, or in his not cultivating the land through hired labour, would thus render the land of less value to his successor. If it be once conceded that the successor of a *Ghatwal* takes possession of *Ghatwali* lands free from all incumbrances created by his predecessor, *i.e.*, he is entitled to the possession of the land in the same condition as it was at the time of the first creation of the tenure, subject to any rights imposed upon it by the Government, it is difficult to say that the land may be encumbered by statutory rights such as rights of occupancy or non-occupancy¹. Thus, as pointed out in the case noted below:—"such rights, if permitted, would have the effect of permanently intercepting very substantial portion of the usufruct of the land, the enjoyment of the whole of which, however, is, by the very constitution of the tenure, deemed essential for the subsistence of the holder of the office and for the efficient discharge of the duties incident thereto"². The growth of such rights would, therefore, seem to be inconsistent with the nature of service tenures. But a custom or local usage might grow up in any particular area as to the recognition of occupancy rights and it might be binding on successive *Ghatwals*. But the restriction on the growth of occupancy or non-occupancy rights in *Ghatwali* (and other service) lands is for the benefit solely of the *Ghatwal*. This reason ceases to be applicable where the land ceases to be held by the *Ghatwal*. When therefore the Zemindar unlawfully dispossesses the *Ghatwal* and settles the land with a raiyat the latter acquires non-occupancy and occupancy rights against his landlord. The Zemindar's position is not improved if upon resumption of the *Ghatwali* lands by Government, they are subsequently settled with him³. A '*raiya*' interest can be acquired in *Chakran* lands which had been resumed by Government and transferred to the Zemindar⁴ and so the occupancy right may accrue in such lands.

The mere fact that the tenants holding under a *Chowkidar* on the *Chowkidari Chakran* lands, paid rents for more than 12 years, would not necessarily shew that at the time when the grant was made by the landlord to the *Chowkidar*, it was the intention of the parties that the *Chowkidari* tenancy should be that of a middle man. If at the inception of the tenancy it was a middle man's interest and if the *Chowkidar*

¹ *Mahesh v. Pran*—1 C. L. J. 138.

² *Upendra v. Ram*—33 Cal. 630. Quoted in *Babu v. Purna*—10 C.L.J. 602.

³ *Babu v. Purna*—10 C. L. J. 602.

⁴ *Bipin v. Tincowri*—13 C.L.J. 271=15 C.W.N. 976.

let out the lands to cultivating raiyats the latter might acquire right of occupancy therein ; but if at the time of the grant it was intended that the grantee was to hold it himself and enjoy the proceeds thereof in lieu of the services to be rendered by him, it could not be said simply from the fact that he sublet the land to somebody else that person would acquire a right of occupancy against the landlord.¹

Land
acquired.

Lands acquired under the Land Acquisition Act, 1894, and the Cantonments Acts, 1889, become the property of the Government or the local body or Railway Company for whom they are acquired. It often happens that such lands are temporarily not required by them. And formerly, if they were temporarily sublet to agricultural tenants, occupancy rights might accrue and these had to be re-acquired again on payment of compensation when lands were again required for public purposes. This consideration deterred them from temporarily subletting such lands when this course might be followed with advantage.² On this ground an amendment has been made in the law the effect of which is to bar the acquisition of occupancy and even non-occupancy rights in such lands.³

Land in
Calcutta.

It was held by the Calcutta High Court that occupancy rights might accrue in those areas which had been included *within* the town of *Calcutta*, subsequent to the passing of the Bengal Tenancy Act, 1885.⁴ But it is now considered undesirable that the Act should have any application to the town of Calcutta as it is now constituted or as it may hereafter be constituted under any future extension or modification of its boundaries. Hence the law has been amended.⁵ But existing rights have been saved.⁶

Land within
Municipality.

It seems that under Act VIII of 1885 before its amendment by Act I of 1907 B.C. right of occupancy might be acquired in *urban areas*. Such was also the case under Act X of 1859.⁷ But the provisions of the Act, which are intended to apply to agricultural areas, are now considered to be unsuitable to such Municipalities or portions thereof

¹ *Upendra v. Ram*—33 Cal. 630.

² *Notes* on the clauses of the Bill of 1906 for amending Bengal Tenancy Act.

³ Act I of 1907 B.C.S. 116

⁴ *Biraj v. Gopeswar*—27 Cal. 208.

⁵ See *Explanation* to Section 1, Act VIII of 1885 added by Act I of 1907 B.C.

⁶ Sub Section (2) added to Section 19 of Act VIII of 1885 by ditto.

⁷ *Hussan v. Gobinda*—9 C.W.N. 141.

as are mainly urban in character. Accordingly Government is given the power to withdraw, by notification from the operation of the Act such Municipal urban areas when it is satisfied that such withdrawal is expedient.¹ A right of occupancy, therefore, can be acquired in agricultural lands within a Municipality unless it is excluded from the operation of the Bengal Tenancy Act by a Government Notification. Even after such Notification rights already accrued are not affected.

Neither Act X of 1859 nor the Bengal Tenancy Act applies to lands *leased to tea-planters* in the Western Duars for cultivation of tea or to lands leased in Jalpaiguri under the Waste Lands Rules. It follows that occupancy rights cannot be acquired in such lands, except by contract. The tenants of the tea-planters in the tea gardens of the Western Duars are mere squatters or coolies, and it was intended by the Notification extending the Act to Western Duars, to debar them from the acquisition of occupancy rights by mere length of occupation.²

When a raiyat reclaims any *waste* land he can acquire occupancy right under the 12 years' rule; but when a land-lord reclaims any waste land, no raiyat can acquire the right in the same during a period of 36 years from the date when the raiyat is introduced.³

Under the old Acts, a right of occupancy could be acquired in an *undivided share of land*.⁴ But under the Bengal Tenancy Act no such right can be acquired therein.⁵ For it is only in a raiyat's *holding* that the right can accrue, and the word '*holding*' has been defined as "a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy."⁶ And a parcel of land means land defined by metes and bounds⁷ and cannot include an undivided share.

¹ Report of the Select Committee on the Bengal Tenancy Act Amendment Bill, 1906.

² Amir Ali & Finucane's *B.T. Act.*, 1st Ed. 38.

³ Act VIII of 1885, 178 (i) & (iii).

⁴ *Jardine v. Sarut*—3 C.L.R. 140; *Baidya v. Sudharam*—8 C.W.N. 751.

⁵ *Hari v. Ranjit*—25 Cal., 917=I.C.W.N. 521; *Baidya v. Illim*—25 Cal. 217=2 C. W. N. 44; See also, *Haribol v. Tasimuddin*—2 C.W.N. 680; *Abdulla v. Golam*—2 C.L.J. 10.

⁶ Act VIII of 1885, S 3 (9).

⁷ *Parbati v. Mathura*—16 C.W.N., 879.

CHAPTER III.

HOW CAN THE RIGHT BE ACQUIRED?

How acquired The next question that we proceed to consider is *how the right of occupancy is acquired*. From what has already been stated, it will appear that in order to acquire the right of occupancy in a plot of land it is necessary in the first place that it should be *held as a raiyat* in the sense already explained. So that if it is held in the right of a *landlord* or any *intermediate holder*, such as an *ijaradar* or farmer of rent or a *tenure-holder* or even an *under-raiyat* no right can accrue in it.

(i) By holding as raiyat.

Acquisition by raiyat of proprietary right.

The acquisition by a raiyat of the proprietary interest in the estate would not prevent his acquiring an occupancy right in his holding, if after his purchase he continued to hold the land as a raiyat and if the relationship of landlord and tenant existed between himself and the proprietors¹. Similarly, a raiyat is not debarred from acquiring the occupancy right in a plot of land owing to his being subsequently jointly interested in the land as an *ijaradar* or farmer². So the acquisition of a *mukarari* right did not prevent him from acquiring the right of occupancy in the same land³.

Suspension thereof.

In the case of a *char* land, (which requires twelve years continuous occupation), where it is shewn to have come into possession of the plaintiffs' ancestors as *raiya*s in 1884 and from then till 1908 it continuously remained in the possession of the plaintiffs and their ancestors by whom it was thoroughly cultivated, but during eight years out of that period the plaintiffs' ancestors were *ijaradars* of a considerable area which included that plot, and notwithstanding this, they still continued to hold as *raiya*s, as they had done before, without any break in the occupation or change of its character, the utmost that can be said is that during the currency of the *ijara* the active operation of the possession as a means of acquiring the right of occupancy was suspended and remained in abeyance, but there was no interruption in the continuity of this possession by the possession of any other raiyat, and as the plaintiffs have held the land in

¹ *Maseyk v. Bhagabati*—18 Cal 21.

² Act VIII of 1885, S. 23(3).

³ *Bama v. Ram*—19 C. W. N. 858, following *Nilmadhab v. Shibu*—13 W. R. 410; *Emam v. Atar*—22 W. R. 138; *Purdeg v. Partab*—11 W. R. 25,

question for twelve continuous years, excluding from computation the period of eight years during which there was a suspension of effective possession, they acquired a right of occupancy in that land¹.

The acquisition of the right does not depend upon *holding under and payment of rent to the rightful owner*². The right grows from the mere circumstance of the raiyat's holding and cultivating the land and paying the rent due in respect thereof³. It has been held by a Full Bench⁴ that an agricultural tenant who enters upon land, whether it be firm or alluvial⁵, and holds under a *defacto* proprietor *bona fide*, is entitled to be treated as a raiyat even as against the true proprietor (and so becomes capable of acquiring the right of occupancy), although the *defacto* proprietor is subsequently proved to be not the real owner⁶. Accordingly, if a *person in wrongful possession of land let it to a raiyat*, who held it for the full statutory period, upon payment of rent, the raiyat acquired the statutory right. In order to make this principle applicable, it is essential that the lessor should be *in possession of the disputed property as defacto landlord* and that *in good faith* he should have *inducted into the land a cultivator who had accepted the settlement in good faith*; and want of good faith either on the part of the lessor or the lessee makes the rule inapplicable⁷. But, as pointed out in the cases noted below⁸, this principle is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses, and the Courts have repeatedly noted that the doctrine must be cautiously applied and is not to be extended. Thus the Court refused to apply it to *zerail* land,⁹ or in derogation of the rule of *Lis pendens*¹⁰.

¹ *Jasimuddin v. Beni*—17 C. W. N. 881=19 Ind Cas 636.

² *Ameer v. Sheo*—19 W. R. 338; *Sreematy v. Radhika*—1 C. L. R. 388.

³ *Zoolfan v. Radhika*—3 Cal. 560=1 C. L. R. 388.

⁴ *Binad v. Kalu*—20 Cal. 708.

⁵ *Nunda v. Banomali*—29 Cal. 871; *Rajendra v. Nanda*—19 C. L. J. 595.

⁶ *Ameer v. Sheo*—19 W. R. 338; *Zoolfan v. Radhika*—3 Cal. 560=1 C. L. R. 388.

⁷ *Krishna v. Mahomed*—34 Cal. 109; *Peary v. Radhika*—5 C. L. J. 9; *Tapu v. Tafayet*—19 C. W. N. 772=20 C. L. J. 563; *Kazi v. Surendra*—5 C. L. J. 33; *Upendra v. Protap*—31 Cal. 703=8 C. W. N. 320.

⁸ *Upendra v. Protap*—31 Cal. 560=8 C. W. N. 320; *Durgi v. Gobardhan*—20 C. L. J. 448.

⁹ *Sharoop v. Joggessur*—26 Cal. 564; *Jonab v. Rokibuddin*—1 C. L. J. 303=9 C. W. N. 571.

¹⁰ *Madan v. Rajkishor*—17 C. L. J. 384.

Holding
under
intermediate
holder.

Similarly if he was inducted into the land by a lessee or *ijaradar* or other intermediate holder, the expiration of the latter's lease no way affected the accrual of the right in favour of the raiyat under Section 6 of Act X of 1859¹ as under the present Act. For although the *ijaradar* has only a limited interest in the property the moment he brings the cultivator on the land, the latter becomes a raiyat whose status is defined and whose rights are regulated by the provisions of B. T. Act. His possession, therefore, in its inception is lawful and as he becomes a raiyat he acquires the right of at least a non-occupancy raiyat², capable of acquiring the status of an occupancy raiyat by holding land for the statutory period.

One not
absolute or
full owner.

If a raiyat had been inducted into the land by one of several co-owners, or the holder of a life-estate, a mortgagee in possession, he is entitled to claim a right of occupancy in the same way as if he has come into possession at the instance of the absolute and rightful owner. It is quite immaterial whose tenant he has been, provided he has held the land *bond-fide* as a raiyat and has paid rent therefor³. If the land was so held, the right is acquired even if no rent was paid for some years⁴.

Possession as
Trespasses.

But although rights of occupancy may be acquired by holding land under a person having no title in the land, a trespasser himself could not acquire such a right⁵. In order to have the benefit of the enactment the person must be in *bond-fide* possession upon payment of rent. Accordingly, a raiyat who *secretly* possessed himself of land and pays no rent for it has no right of occupancy in that land⁶. Nor can possession obtained and continued by fraud create any right of occupancy⁷.

Permissive
possession.

Permissive possession, not founded upon any right, such

¹ *Gholam v. Harish*—17 W. R. 552; referred to in *Radha v. Milan*—18 C. L. J. 23; See *Ichamoyi v. Kailash*—18 C. W. N. 338.

² *Atal v. Lakhi*—10 C. L. J. 55.

³ *Kali v. Bhagaban*—17 C. L. J. 431; *Sheo v. Ram*—8 B. L. R. 105 *Zoolfan v. Radhika*—3 Cal. 560.

⁴ *Narain v. Opnit*—9 Cal. 305; *Musyatulla v. Noor*—9 Cal. 808. See *Ichhamoyi v. Kailash*—18 C. W. N. 358.

⁵ *Peer v. Meeah*—W. R. Sup. F. B. 136; *Gholam v. Poorno*—8 W. R. (Act X) 147; *Ghreeb v. Bhuban*—2 W. R. (Act X) 85.

⁶ *Ghareeb v. Bhuban*—2 W. R. (Act X) 86; *Gholam v. Poorno*—3 W. R. (Act X) 147; See also *Brojobasi v. Ram*—23 C. L. J. 638.

⁷ *Bhubanjoy v. Ram*—9 W. R. 449.

as that of a servant or licensee, though for twelve years, cannot confer the right.¹

The acquisition of the right does not depend on the raiyats' cultivation. It is not necessary that the raiyat should cultivate himself the land in his occupation. If the land is acquired primarily for that purpose, cultivation carried by any one of the methods indicated in S. 5(2) would impress on him the status of a settled raiyat of the village², capable of acquiring the right of occupancy. And, whether he let out the land to others for purposes of cultivation, taking from them a share of the produce by way of profit, or whether he has it cultivated by members of his family or by labourers, his position is the same³. The law does not require that a person in order to acquire the right should be a *bona-fide* cultivator. Even if the raiyat sever himself entirely from the cultivation of the land and make himself a mere receiver of rent, he retains the character of a raiyat. The provisions of the B. T. Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are *actually* under cultivation⁴.

Cultivation by raiyat himself not necessary.

It was said in an early case that for the acquisition of a right of occupancy only two conditions were necessary:— (a) the cultivation or holding of land for a period of twelve years, and (b) that the person holding or cultivating the land should be a raiyat⁵. But it was provided in the former Rent Act that a raiyat had an occupancy right in land “so long as he paid the rent payable on account of the same⁶.” It was accordingly held that though non-payment of rent did not bar the acquisition of occupancy right, payment of rent was necessary to maintain it, and non-payment rendered a raiyat liable to be evicted. And though non-cultivation of land, coupled with non-payment of the rent, might be sufficient to be justify the conclusion that tenant had relinquished the land, mere non-payment of rent was not in itself sufficient to shew that there was no subsisting right of occupancy⁷. But non-payment of rent may be a valid

Payment of rent if necessary.

Effect of non-payment

¹ *Meherali v. Ramrutan*—21 W. R. 400; *Addoyto v. Peter*—17 W. R. 383; *Kabeel v. Radha*—16 W. R. 146; *Wooma v. Boku*—13 W. R. 333.

² *Finnane and Amir Ali's B. T. Act*, 1st Ed. 120—121.

³ *Brindaban v. Issar*—(1864) W. R. (Act X) 1; *Ram v. Lukhi*—1 W. R. 71; *Kali v. Amiruddin*—9 W. R. 579.

⁴ *Dina v. Sashi*—22 C. L. J. 219.

⁵ *Narian v. Opnit*—9 Cal. 804—11 C. L. R. 417.

⁶ Act X of 1859, S. 6; Act VIII B. C. of 1869.

⁷ *Nilmani v. Sanatan*—15 Cal 17; See also *Hem v. Chand*—12 Cal 115; *Masyatulla v. Nur Zahan*—9 Cal. 808—12 C. L. R. 389.

ground for holding that the land was held not by a raiyat but by a trespasser.¹ When the relation of landlord and tenant has once been proved to exist, the mere non-payment, though for several years, is not sufficient to show that it has ceased.²

Rent in
money or
kind.

A *raiya*t who paid rent *in kind* but who had held or cultivated the land for a period of twelve years had a right of occupancy in the land so held or cultivated by him so long as he paid the rent (though in kind) for the same.³ The matter has already been sufficiently discussed.

(ii)
By twelve
years'
occupation.

In the second place, the right of occupancy is acquired by a raiyat *occupying a piece of land for a period of twelve years* except in the case of a raiyat who has already acquired the status of the settled raiyat of the village in which case no period of occupation of the land is required.

Wholly or
partly before
or after Act.

The holding of land for twelve years may be *wholly before or wholly after or partly before or partly after* the passing of Act X of 1859 to entitle the raiyat to a right of occupancy⁴ and the Bengal Tenancy Act has laid down the same rule of law.⁵

Ancestor's
occupation.

A raiyat is also entitled to the benefit of the occupation by his father or other *person from whom he has inherited*. "A person shall be deemed"—according to the Bengal Tenancy Act—"to have held as raiyat any land held as a raiyat by a person whose heir he is". Thus in computing the period of twelve years required for the acquisition of a right of occupancy, raiyats are entitled to add to their own possession the time during which the person from whom they inherited the land had been in occupation.⁷ This is under the present law as it was under the old.

Joint
occupation by
co-sharers.

Whether the land was in the sole and *exclusive* possession of the raiyat or was held *jointly* with others, or partly jointly and partly severally, he was under the old law, entitled to the benefit of the possession for the purpose of accrual of the occupancy right.⁸ The Bengal Tenancy Act also refers to raiyats

¹ Sarada Mitra's *Land Law of Bengal*, 331.

² *Ranga v. Abdul*—4 Cal. 314=5 C. L. R. 119. See 7 Bom. 40.

³ *Jutto v. Basmatee*—15 W. R. 479; *Hurihar v. Biressar*—6 W. R. (Act X) 17.

⁴ *Thakoorani v. Bisheshur*—B. L. R. F. B. 202=3 W. R. (Act X) 29.

⁵ Act VIII of 1885, S. 20 (1).

⁶ Act VIII of 1885, S. 20 (3).

⁷ *Watson v. Sarat*—7 W. R. 395; *Nani v. Murari*—8 W. R. 127; *Lal v. Solano*—10 Cal. 45—12 O. L. R. 559.

⁸ *Forbes v. Ram*—22 W. R. 51. But see *Mahomed v. Ram*—8 B. L. R. 338=22 W. R. 52n.

in *joint occupation* of land as raiyati holding and lays down that when land is held by two or more *co-sharers* as a *raiya* holding, each of the co-sharers are deemed to hold it as a raiyat and acquires the status of a settled raiyat and a right of occupancy with it.¹ The mere fact of *joint holding* by a number of persons does not prevent the right as to the entire land growing in any one of these joint-tenants or tenants-in-common.² The status of a settled raiyat is thus acquired by a cultivator who has held any land in the particular village for twelve years continuously, jointly with others, for the whole period or part of the time.

They were and still are entitled to add to their possession the period during which the holding has been in the occupation of their transferers, if the *jotes* were transferable, but not otherwise,³ even with the consent of the landlord.⁴

Formerly under Act X of 1859, a raiyat could acquire a right of occupancy by twelve years' occupation; whether he held under a *patta* or not, but this provision did not affect "the terms of any written contract for the cultivation of land, when it contains any express stipulation to the contrary"⁵. The question as to the effect of occupation under successive written leases for terms of years aggregating to more than twelve years, or under a *single* lease for more than twelve years, was raised in several cases and there were conflicting judgments of the High Court, and the law was ultimately settled by a Full Bench, "The whole question"—said Couch, C. J. delivering the judgment:—"turns upon what is the meaning of an express stipulation contrary to the raiyat acquiring the right of occupancy. Now, where there is a *patta* for a *fired term*, no doubt at the expiration of that term the landlord has a right of re-entry upon the land; and if the raiyat does not give up possession, the landlord may recover the land from him. The landlord need not enter upon the land, if he does not think fit; he may, and often does, allow the tenant to remain in possession of the land. I can not consider that the *right to re-entry*, which arises by reason of the expiration of the term named in the *patta*,

Transferer's possession.

Occupation under lease or otherwise.

Successive or single lease for term.

¹ Act VIII of 1885, S. 20(4); See *Forbee v. Ram*—22 W. R. 51, setting aside *Mahomed v. Ram*—22 W. R. 524=8 B. L. R. 338.

² *Sarada Mitra's Land Law of Bengal*, 330; See *Peary v. Radhika*—5 C. L. J. 9.

³ *Watson v. Sarat*—7 W. R. 395; *Dinobandhu v. Ram*—9 W. R. 522, *Durgu v. Brindaban*—11 W. R. 162; *Narendra v. Ishan*—22 W. R. 22=1 B. L. R. 274; *Khirodd v. Gordon*—23 W. R. 237.

⁴ *Lal v. Solano*—10 Cal. 45=12 O. L. R. 459; *Tara v. Surjo*—15 W. R. 152; *Hyder v. Bhubendra*—17 W. R. 179.

⁵ Act X of 1859, S. 6. & 7.

Effect of
covenant for
re-entry—
express or
implied.

Holding over
after expiry
of term.

can be regarded as an express stipulation that the raiyat shall not, if he occupies the land for more than twelve years, acquire the right of occupancy even by Section 6"¹. The effect of this decision seems to be whether a raiyat held under a single lease, or under different leases following one after the other, he acquired a right of occupancy in the land so held by him when the entire period of occupation exceeded twelve years, provided there was *no express covenant for re-entry* by the landlord at the expiration of any of them. An *implied covenant for re-entry* was not sufficient to defeat the statutory right, which could be acquired by a raiyat by twelve years' occupation². A mere reservation of a right of re-entry on the part of the landlord, unless it amounted to an express stipulation by which the raiyat contracted himself out of the benefit of the Act, did not bar the accrual of the right. An express covenant for re-entry, however entitled the landlord to eject the raiyat at the end of the term, but if the landlord allowed the raiyat to *hold after the expiration of the term* of the lease, he was entitled to add the period of his occupation under the lease to the subsequent period, and if the total period exceeded twelve years, the raiyat acquired a right of occupancy³. The Bengal Tenancy Act has laid down that a raiyat acquires the right of occupancy by twelve years whether he holds "*under a lease or otherwise*"⁴ that is to say, he acquires the right, whether there is a covenant for re-entry or not. And nothing in any contract between a landlord and tenant made before or after the passing of this Act, shall bar in perpetuity the acquisition of or take away, the right of occupancy in any land⁵. A covenant for re-entry is now invalid and is not enforceable. The land may be held under a continuous lease or under leases renewed from time to time, but in the aggregate the occupation must amount to the statutory period⁶.

In case of
private land.

In case of the *private lands* of proprietors held by a raiyat, we have already seen that the right cannot be acquired when such lands are held "under a lease for a term of years

¹ *Sheo v. Ram*—17 W. R. F. B. 62=8 B. I. R. 165, followed in *Gholam v. Harish*—17 W. R. 552; *Narian v. Mansur*—25 W. R. 155.

² *Mukhtar v. Brojoraj*—9. C. L. R. 144; *Chandrabati v. Harington*—18 Cal. 349=L. R. 18 I. A. 27.

³ *Ibatullah v. Mahomed*—25 W. R. 114; *Mukhtar v. Brojoraj*—9 C. L. R. 143.

⁴ Act VIII of 1885, S. 20(i) & S. 21.

⁵ Act VIII of 1885, S. 178.

⁶ *Amir Ali*—Finucane's B. T. Act, 2nd Ed., 135.

or from year to year" ¹ and whether the raiyat holds under one lease or successive leases, possession for twelve years gives him no right. But if the land was not initially let out for a term or from year to year, it would seem that twelve years occupation would confer on the raiyats the right even to such lands ².

So in cases of *utbandi*, *char* and *diara* lands ³.

Utbandi,
Char and
Diara lands.
Waste land.

When a raiyat reclaims any *waste* land he can acquire occupancy right under the twelve years rule, but when a landlord reclaims any waste land, no raiyat can acquire occupancy right in the same during a period of 30 years, from the date when the *raiya*t is introduced, and contracts barring the acquisition of the right during the period are valid. ⁴

The continuity of a raiyat's occupation may, however, be broken by wrongful act on the part of the landlord, such as forcible *oust*er. In such a case after the raiyat has recovered possession, it was held that if the eviction were wrongful, it would not be such an interruption as would prevent the raiyat from acquiring the right of occupancy, but it was for the raiyat to shew that the eviction was wrongful ⁵. Similarly when the landlord enters into the land alleging its abandonment by the raiyat and the raiyat afterwards succeeds in recovering possession of the same by a suit under Sec. 87 of the Bengal Tenancy Act, the continuity of his possession is not deemed to have been broken during the period he is out of possession, and he shall be deemed to have continued to be a settled raiyat, notwithstanding his having been out of possession more than a year. ⁶

Dispossession
by landlord.
—Its effect.

In view of the difficulty under which the raiyats ordinarily laboured in giving evidence of the *continuity* of their holding, the legislature has enacted in B. T. Act that if in any proceeding under the Act it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be *presumed* that he held it continuously for twelve years, the *onus* being

Presumption
of continuous
holding in
favour of
raiya't.

¹ Act VIII of 1885, S. 116.

² *Masudan v. Gudar*—1 C. L. J. 456.

³ See *Ante*.

⁴ Act VIII of 1885, S. 178 Proviso (i) and (ii).

⁵ *Mahomed v. Nur*—24 W. R. 324: *Lutifunnissa v. Pullin*—W. R. S. P. F. B. 91: *Radha v. Rakhal*—12 Cal. 82.

⁶ Act VIII of 1885, S. 20. (6).

on the landlord to establish the contrary¹. Even where the possession of a land for 11 years prior to the date of enhancement of rent is proved there is a presumption of possession for 12 years². This works no hardship on the landlord for it is always easy for him to prove when the occupation began and thus to rebut the presumption. This presumption applies to a proprietor's private land as well as to ordinary raiyati land¹. This presumption can only arise in the case of a raiyat who has other occupancy holdings in the *same village*, when those other occupancy holdings are held under the *same landlord*³, and does not apply to the occupants of *char* and *diara* lands⁴.

(iii) Holding same land, if necessary. Act X of 1859.

We have already seen that under Act X of 1859 and Act VIII B.C. of 1869 the acquisition of the right depended upon *possession* for a period of at last *twelve years of the same plot* of land, in other words, it was necessary for a raiyat to have been in occupation of the *same land* for the statutory period of twelve years, before he could acquire a right of occupancy⁵. His possession must ordinarily have been *continuous* for 12 years over the *whole* of the land in respect of which the right was claimed and the fact that he was in occupation of *different areas of lands in different years*, would not entitle him to a right of occupancy in the *whole*, unless it was proved that he had a right of occupancy in a *portion*, and the parties intended that the additional lands also should also be impressed with the existing rights in respect of the original lands of the holding⁶. And the right could be acquired only in the *particular piece* or pieces of land held and cultivated by a raiyat for the required number of years. That is to say, the raiyat who cultivated or held the *same land* for the statutory period acquired a right of occupancy in *that land* and *no other*, whether he was resident of the same village or not, and if he took up fresh land in the village, the fact that he had some other land in the village for more than twelve years did not give him any right of occupancy in his new acquisition till he had held it for twelve years. Landlords sometimes took advantage of the law and prevented raiyats from acquiring a right of occupancy by *shifting them or changing the lands of their holdings* before the expiration of the statutory period.⁷

Shifting raiyats.

¹ Act VIII of 1885, S. 20 (7).

² *Rasul v. Abul*—28 Ind. Cas. 380.

³ *Kuldip v. Chatur*—3 C. L. J. 285.

⁴ *Beni v. Chaturi*—33 Cal., 444=4 C. L. J. 63.

⁵ *Amar v. Bakshi*—22 W. R. 228.

⁶ *Saligram v. Paluk*—6 C.L.J. 149.

⁷ Finucane and Amir Ali's B. T. Act, 1st Ed. 119.

This devise has been put a stop to by the Bengal B. T. Act. Tenancy Act, under which, in order to become a *settled raiyat* of the village, a raiyat need only hold "*as a raiyat*" some land in the village continuously for a period of twelve years. It is not necessary that he should continuously hold the same land. The Bengal Tenancy Act has thus made a material addition as to the means of the acquisition of the right, (except as to *Utbandi*, *Char* or *Diara* lands). A settled raiyat of the village may now acquire the right in every piece of land he holds in the village, in which he is a settled raiyat, even if the period of occupation be much shorter than twelve years¹. For him occupation for twelve years is not necessary. *As soon as he touches a piece of land as a raiyat, he acquires an occupancy right in it.* We have sufficiently discussed this point and no further discussion of it is necessary. But this rule does not apply to the case of *Utbandi*, *Char* and *Diara* lands for which twelve years occupation of the same piece of land is required².

The land must be *within* the boundaries of the village, it matters not into how many *estates* the village may be divided. But the landlords even now can prevent their raiyats' acquiring occupancy rights by *shifting them from one village to another* within their estates before the completion of the statutory period³. (iv). Land if should be in same village.

The question whether a raiyat can become a "*settled raiyat*" by holding, during twelve years, different plots, making up the aggregate period in the same village, under different landlords, or whether he must hold his land under one and the same landlord; has given rise to the some Holding different plots under same or different landlords. doubt⁴. He may hold one piece of land for five years, another for four and a third for three, and he then becomes a "*settled raiyat*" and acquires the right of occupancy in any piece or pieces of land so held by him at or after 12 years⁵. But from the language used in the section it seems that a raiyat holding *different plots* of land in the same village under different landlords for the statutory period fulfils the conditions required by law⁶.

Formerly, a right of occupancy could be acquired not By custom. only by holding the land in the manner prescribed by the statute, but also by *custom* or usage prevalent in the

¹ Act VIII of 1885, S. 22, 21.

Bengal Tenancy Act VIII of 1885 S. 180 (1).

Rampini's B. T. Act, 4th Ed. 97.

Rampini's B. T. Act, 4th Ed. 98. *Kuldip v. Chatur* 3 C. L. J. 285.

Sarada Mitra's *Land Law of Bengal*, 326, 328.

Amir Ali & Fiuucane's B. T. Act 1st Ed., 120.

locality. The Bengal Tenancy Act has made a reference to such a *custom* and declared that the right acquired thereby shall be maintained¹. At present, it seems that there is no such special custom in existence. If it is proved to exist anywhere in the Province, such a "custom, usage or customary right" not being "inconsistent with or not expressly or by necessary implication modified or abolished by its provisions" is valid under the Act and will be upheld².

By contract.

The Bengal Tenancy Act has declared as invalid only such *contracts* which "*bar in perpetuity the acquisition of an occupancy right in land*"³ or "*prevent a raiyat from acquiring in accord once with this Act an occupancy right in land*"⁴. A contract between a landlord and a raiyat *creating* rights in land similar to those acquired by a raiyat under the Bengal Tenancy Act is, therefore, valid and must be upheld.

Previously
acquired
right.

The Act has further expressly saved all such rights which had been *previously acquired* under the old Rent Acts.⁵ Even apart from its provisions, the Courts have gone so far as to hold such rights are not forfeited by their repeal, there being nothing in Bengal Tenancy Act to deprive the raiyat of the statutory right which had been actually acquired⁶, and a contract to take away such right is also declared to be void⁷.

¹ Act VIII of 1885, S. 10.

² *Ibid*, S. 183.

³ *Ibid*, S. 178(1) (a).

⁴ *Ibid*, S. 178(3) (a).

⁵ *Ibid*, S. 19(1)

⁶ *Hari v. Narsingh*—21 Cal 129. *Hassan v. Govind*—9 C. W. N. 141.

⁷ Act VIII of 1885, S. 178 (1) (b).

CHAPTER IV.

THE PRIVILEGES AND LIABILITIES OF THE OCCUPANCY RAIYAT.

S. 1.—PROVISIONS REGARDING RENT.

(i) *Liability to pay rent.*

During the continuance of the relationship of landlord and tenant the main duty of the occupancy raiyat, as indeed the primary duty of all tenants, is to *pay the rent* of his holding to his landlord regularly. It was provided in the former Rent Acts that a *raiya* had an occupancy right in land “*so long as he paid the rent* payable on account of the same” and that the non-payment of rent rendered a raiyat liable to be evicted¹. Liability to pay rent.

It was, therefore, at one time thought that, though non-payment of rent did not bar the acquisition of the right of occupancy, in order to maintain the right already acquired payment of rent was necessary, so that where a raiyat who had been out of possession for some years sued to recover his holding but failed to shew payment of rent during the period of dispossession, it was held that he had no subsisting right of occupancy². In a later case, however, it was held that mere *non-payment* of rent taken by itself was not sufficient to warrant the conclusion that there was no subsisting right of occupancy, although the fact that the raiyat had for a long time ceased to cultivate the lands, coupled with the non-payment of rent, might give rise to the inference that he had *relinquished* the holding³. All these difficulties, however, have disappeared under the present law; for under it, an occupancy raiyat *can not be ejected* for non-payment of rent but his *holding* is liable to be *sold in execution* of a decree for arrears of rent there of⁴. It is the liability to pay rent that establishes the relationship of landlord and tenant, but the actual payment of rent is not necessary to constitute or maintain that relation and mere non-payment of rent does not determine it⁵. Effect of non-payment.
Under old law.
Under present law.

¹ Act X of 1859, S. 6=Act VIII of 1869 B.C. S. 6.

² *Hem v. Chand*—12 Cal 115.

³ *Nilmani v. Sanatan*—15 Cal 17.

⁴ Act VIII of 1885, S. 65.

⁵ *Rampini's B. T. Act*, 4th Ed., 26, and authorities cited there.

(ii) *Rate of rent.*

Rate of rent.	The <i>rate of rent</i> is, generally, <i>determined by contract</i> which need not be in writing and, in the absence of a written contract, oral evidence is always admitted. If a written contract exists it is provable in the usual way.
In case of Contract.	Where the contract was entered into prior to the passing of the Bengal Tenancy Act, the rent is payable at the <i>contract rate</i> , if the contract is otherwise valid ¹ . If <i>no contract</i> exists, and if a question arises as to the amount of the rent in a particular year, the rent paid in the preceding year is assumed to be the rent payable during that year ² .
Where no contract.	The presumption applies not only in respect of a <i>particular succeeding year</i> , when it is proved that the rent was realised for the immediately preceding year at a particular rate, but also to <i>each succeeding year one after another</i> until its operation is arrested by proof on the part of the tenant (or the landlord) that the conditions of the tenancy have altered in the meanwhile ³ . Even though there is a contract, under the Bengal Tenancy Act the rent payable by an occupancy raiyat is to be at a " <i>fair and equitable rate</i> " ⁴ .
Fair and equitable rate.	The landlord is entitled to claim no more, and the tenant is not entitled to pay less than what is payable at such rate. Under the old law it was held that " <i>fair and equitable rent</i> " meant not the rate obtainable by competition, but the <i>prevailing rate</i> payable by the same class of raiyats for the land of a similar description and with similar advantages in places adjacent ⁵ i.e., the customary or <i>Pergana</i> rate and that what was fair and equitable depended upon the value of the produce and cost of production ⁶ . But under the B. T. Act in the absence of any evidence as to any other rate being fair and equitable, there is a <i>presumption as to the rent</i> for the time being payable, (or in other words, the <i>existing rent</i>) being <i>fair and equitable</i> ⁷ . The existing rent is the result of the customs, traditions, experience and haggling of all the preceding ages and is therefore presumed to be fair and equitable until the contrary is proved. It is for the landlord or the tenant who requires the existing rents to be altered to produce evidence to prove that the existing rent is not fair and equitable. The presumption in favour of the existing
Presumption of existing rate being fair and equitable.	

¹ Sarada Mitra's *Land Law of Bengal*, 33.² Act VIII of 1885, S. 51.³ *Rajabala v. Srish*—25 Ind Cas 552.⁴ Act VIII of 1885, S. 24. See also Act X of 1859, S. 5=Act VIII of 1869 B.C. S 5.⁵ *Thakoorani Dassi v. Biresbur*—3 W.R. (Act X) 29=B.L.R. Sup 202.⁶ *Issur v. Hills*—W. R. (1864) 148; *Hills v. Jender*—1 W. R. 3.⁷ Act VIII of 1885, S. 27.

rent being the fair and equitable rent may be *rebutted by shewing*:—(a) that the rent paid by the raiyat is below the prevailing rate, that the average prices of staple food crops have arisen during the currency of the present rent, that the productive powers of the land have increased by an improvement effected by the landlord, or by fluvial action¹ in which cases the existing rent must be *enhanced* in order to arrive at a “fair and equitable” rent; or (b) that there has been a fall in the average prices of staple food crops during the currency of the present rent, that the soil has become deteriorated by a deposit of sand or the like² in which latter cases the existing rent will have to be *reduced* in order to arrive at a “fair and equitable” rent within the meaning of the Act. It is on these grounds alone and none others that the rent of an occupancy raiyat may be *altered* that is to say enhanced or reduced.

How rebutted.

(iii) *Presumption as to fixity of rent.*

. In Chapter VIII B. T. Act which deals with “*General Provisions as to Rent*” and which therefore applies to occupancy *raiya*ts, it is provided that “where a *raiya*t and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased”³, and to facilitate the proof by the raiyat of payment of rent at the uniform rate since the time of the Permanent Settlement, it has been definitely laid down that “it shall be *presumed*, until the contrary is shewn, that they have held at that rent or rate of rent from that time if it is proved that the same has not been changed during 20 years, immediately before the institution of the suit or proceeding” under the B. T. Act.⁴ Thus if the fact of uniform payment of rent for 20 years immediately before the institution of the suit or proceeding is established, it must be *presumed*, unless the contrary is shewn, that the tenant has held at that rent or rate of rent from the time of the Permanent Settlement⁵.

Presumption as to fixity of rent.

From payment of uniform rent for 20 years.

The presumption does not arise where the defendant admits that the *tenancy commenced at a later date* than the Permanent Settlement, for it must be carried back to the

Except where origin of tenancy known.

¹ Ibid, S. 30.

² Ibid, S. 38.

³ Act VII of 1885, S. 50 (1).

⁴ Ibid (2).

⁵ *Tirthananda v. Herdu*—9 Cal. 252.

time of the Permanent Settlement to make the rent or rate of rent not enhanceable. But in order to have that effect the allegation must be *explicit*. In other words, if there be no *express statement* on the part of the tenant that the tenancy commenced after the Permanent Settlement, the presumption arising from uniform payment of rent for 20 years must be rebutted and the benefit of the presumption must be given to the tenant¹.

Proof of
payment for
20 years.

In order to take the benefit of the presumption which the law allows to be raised from proof of the fact that rents have not varied for 20 years previous to the suit, the raiyats can give what is the best proof of non-variation *viz.* that they have paid uniformly for 20 years preceding the suit. Then the best evidence of payment being *receipts*, these are ordinarily filed to support the plea. When receipts are filed *not for the entire period* of 20 years preceding the suit, but *some are wanting here and some there* in that interval, still uniform payment may be proved otherwise for the wanting years by other proof and from surrounding circumstances². It is not absolutely necessary that the *Dakhilas* should be for 20 consecutive years before the date of the suit, for it might frequently happen that parties, with every right to the presumption, might *lose one or two of the Dakhilas* here and there during such a long period; and it would be manifestly unjust to deprive them of the benefit allowed by law, when no suspicion can arise of misfeasance, merely because one or two of these receipts has been mislaid or lost, and, where the *missing dakhilas* are for years about the middle of the period their non-appearance should not be held to defeat the tenant's claim to the presumption³. It is not, therefore, necessary that there should be evidence bearing on *every year of the twenty*; it is sufficient if the whole interval is included between the limits upon which the evidence bears provided that the evidence is such as to lead to the belief that the rent was uniform throughout the intervening period⁴. A small variation in the *jama* which was *unexplained* was not sufficient to rebut the presumption⁵.

Does it apply
to occupancy the
raiya's?

In a case it was held by the Calcutta High Court that the presumption of fixity of rent did not apply to

¹ *Mongola v. Kumudchandra*—5 C. W. N. 60.

² *Elahee v. Roopun*—7 W. R. 284.

³ *Kattiyani v. Sundurce*—2 W. R. (Act X) 60.

⁴ *Rampini's*, B. T. Act, 4th Ed. 176, See authorities cited there.

⁵ *Grant v. Harshai*—18 Cal. 76.

occupancy raiyats¹ and Amir Ali and Finucane point out² that this view has been overruled by a Full Bench according to which occupancy raiyats are entitled to the benefit of the *presumption as to fixity of rent under S. 50* and that where it is proved that such raiyats have held their lands at a uniform rent for twenty years they should be held to be "rai-yats holding at fixed rates" until the contrary is shewn³. But the contrary view appears to have been held by Mookerjee, J. in a very recent case⁴ in which his Lordship observes:— "Here we have a plot of agricultural land held by a tenant who has been unquestionably occupancy raiyat; the tenancy is *not transferable* by local custom or usage; the rent has not been altered for a term of 40 years; and the origin of the tenancy is unknown. Can we hold, as a matter of law, that the only inference legitimately deducible from these facts is that at the inception of the tenancy the rent was, by agreement of parties, fixed in perpetuity? It is plain that the inference as to the terms of the original contract is to be drawn from the conduct of the parties. The only conduct of the [landlord] or his predecessor whereupon reliance is placed by the tenant is his omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception, was for payment of rent fixed in perpetuity? The answer must obviously be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because in view of the amount of rent already fixed as well as the character of the land comprised in the tenancy, no further rent could be legitimately claimed. And, in the absence of any information about the history of the holding or the condition of the land included therein, we do not know what would be fair rent at the present time or would have been the fair rent during years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of rent even for 40 years the inference does not follow as a matter of course that the informal contract was for payment of rent at a fixed rate for ever. If we

¹ *Bansi v Jugdip*—24 Cal. 152.

² Finucane and Amir Ali's *Bengal Tenancy Act*, 1st Ed., 238
But F. B. don't go the length of deciding so far.

³ *Dulhin v. Balla*—25 Cal. 744.

⁴ *Jagabandhu v. Magnamoyi*—24 C.L.J. 363=36 Ind. Gas 884 (Cal.)

are to accede to such a contention we should be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding does so at his peril, and that his forbearance, however just, will raise a presumption against him that the tenant has held at a rent fixed in perpetuity."

Occupancy
raiyat may
acquire right
to fixed rent.

But with all respect to his Lordship it may be permissible to point out that the rule regarding the above presumption is laid down in Chapter VIII Bengal Tenancy Act which dealing with the *general* provisions as to rent applies as much to occupancy raiyats as to the other raiyats. The reasons which induced the legislature to lay down the rule holds good with equal, if not much greater, force in the case of the occupancy raiyats than in the case of the other tenants, and the practical effect of his Lordship's decision is to deprive the occupancy raiyats of the advantage which the legislature has thought fit to confer on them. The grounds which his Lordship has been pleased to state for that decision are not peculiar to the case of the occupancy raiyats. Besides, S. 50(2) Bengal Tenancy Act does not lay down a new law but only confirms what was held by the High Court in a series of cases under the old Rent Law. And the legislature has always recognised a class of raiyats who were known as "*khud kasht kadimi* raiyats" or *occupancy raiyats at fixed rates*.¹ Even in cases where S. 50 is not directly applicable, the court may act on a similar presumption if the facts justify the necessary inference. Thus where the occupancy raiyats proved that their holdings had been held at the same rents for periods of 27, 57 and 60 years respectively, and there was no evidence to prove that any different rents had ever been realised, the High Court was of opinion that on this evidence, apart from any presumption under S. 50, Bengal Tenancy Act, the court was justified in holding that their status was that of *occupancy raiyats holding at rents fixed in perpetuity*.² Occupancy raiyats therefore ought to be held to acquire the *right to fixed rent* by payment of uniform rent or rate of rent for a long period of time in addition to the ordinary privilege which the law has conferred on them. And this view has also been taken by the High Court in a series of cases noted below³. The decision of Mookerjee, J. above

Occupancy
raiyat—at
fixed rate.

¹ See *Abdul v. Makbul*—22 C. L. J. 223=20 C. W. N. 185.

² *Gulab v. Kalunand*—12 C. L. J. 107.

³ *Dinendra v. Tituram*—30 Cal. 801; *Nityananda v. Nand*—13 C.L.J. 415; *Nanda v. Atarmani*—35 Cal. 763=12 O. W. N. 432; *Grant v.*

referred to was a case in which fixity of rent was claimed by a *transferee* from an occupancy raiyat. But the general proposition laid down by his Lordship refers to such claim by the raiyat himself and is in conflict with these cases.

But, whatever might be the correct view regarding the applicability of the presumption to the case of the occupancy raiyats, there can be no doubt that the presumption, even if it applies to their case, cannot operate to *convert an occupancy raiyat into a raiyat holding at fixed rates*, nor does it render the tenancy subject to the incidents of a holding at fixed rates, as prescribed by S. 18 Bengal Tenancy Act. In the case already referred to the learned Judges observed:—
 “The class of ‘*raiya*ts holding at fixed rates’ is specially defined by S. 4 of the Act as meaning ‘raiyats holding either at a rent or a rate of rent fixed in perpetuity’; in other words, the rent or rate of rent must be fixed in perpetuity at the commencement of the tenancy. We entertain grave doubts whether this class of raiyat can be created by the operation of S. 50. All that it says is that a raiyat who has held at the same rent or rate of rent since the time of the Permanent Settlement shall not be liable to have his rent increased. It does not say that such a raiyat is a raiyat holding at fixed rates, or that the tenancy shall be subject to the incidents of a holding at fixed rates as prescribed by S. 18 of the Act.”¹ An occupancy raiyat may however obtain a grant of fixed rent but, in that case, he does not thereby lose his right of occupancy². He will become an *occupancy raiyat at fixed rate*.

But can't acquire status of raiyat at fixed rate.

(iv.) *Enhancement of Rent.*

The effect of provisions stated above is to give the raiyats practical certainty as to the amount of rent which they may be liable to be called on to pay at any particular time. In fact the presumption that the existing rent is fair and equitable, and the provision permitting alteration of it on certain specified grounds only, constitute the most potent safe-guards in this Act for the protection of the raiyats against arbitrary and uncertain alterations of rent.³

Protection from enhancement.

Robinson—11 C. W. N. 442. *Gulab v. Kalanand*—12 C. L. J. 107=14 C. W. N. 884. *Dulhin v. Bulla*—25 Cal. 744. But Contra in *Birendra v. Faizuddi*—22 Ind. Cos. 943.

¹ *Bansi v. Jugdip*—24 Cal. 152.

² *Abdul v. Mabbul*—22 C. L. J. 223=20 C. W. N. 185 referring to *Bhut v. Manmatha*—11 C. L. J. 98=13 C. W. N. 1025 vide also pp. 113-114.

³ See Finucane and Amir Ali's, B.T. Act, 143-144.

What is enhancement.

From the above it is quite clear on what grounds the rent of an occupancy raiyat may be enhanced or reduced. We now proceed to deal with these. First as to *enhancement*. It should be noted that it is only cases of *increase in the rate of rent* which is designated in the Act as "enhancement" of rent, whereas an *increase in the amount of rent* by reason of increase in area is not called "enhancement" but is styled "*alteration*" of rent.¹

By contract or by suit.

To prevent capricious enhancement of rent which was rather common in some parts of Bengal, the Bengal Tenancy Act debarb an enhancement of rent paid in money except *by contract or by suit*, which again is subject to limitations imposed by the law.

I.
By contract ;
Under old
Law.

S. 17 of Act X of 1859 provided that raiyat a having a right of occupancy was not liable to enhancement of rent previously paid by him, except on some one of the specified grounds. It plainly did not affect enhancement *by mutual agreement* of the parties. This is amply indicated by its phraseology *viz.* "no raiyat, having a right of occupancy, shall be *liable* to an enhancement of the rent"—that is, no occupancy raiyat can have a liability imposed upon him against his wish by the land-lord in respect of enhanced rent. This interpretation is in accord with what was generally deemed to be its true scope for a long series of years. In fact it has been constantly assumed by the courts that it did not affect contractual enhancement of rent.

Under B.T.
Act.

It was, indeed, with a view to afford the occupancy raiyat a certain degree of protection against improvident agreements for enhancement of rent that the Legislature enacted Sec. 29 of the Bengal Tenancy Act.²

Limitations

The limitations on contractual enhancement are as follows. In the first place the contract must be in *writing* and *registered*.³ But when a contract is not provable, because it is not in writing or because it is not registered, the land-lord is not debarred "fro recovering the rent at the rate at which it has been *actually paid* for a continuous period of not less than *three years* immediately preceding the period for which the rent is claimed."⁴ Thus if two elements are proved—*viz.* *first* that there was an *agreement* to

(i)
Must be in
writing and
registered.

¹ *Satis v. Kabiruddin*—26 Cal. 233 (238).

² *Gaju v. Cooke*—16 C.L.J. 422=17 C.W.N. 430=16 I.C. 929.

³ Act VIII of 1885, S. 29 (a).

⁴ *Ibid*, *Proviso* (i) See *Mathura v. Mati*—25 Cal. 781.

pay rent at a rate which is higher than the previous rate; and *Secondly* that the rent has been *paid* at a higher rate,—the inference follows that the requirements of Proviso (1) of S. 29 have been fulfilled, although it is not proved that the whole amount payable at the stipulated enhanced rate has been actually realised by the land-lord from the tenant.¹

In the second place (b) even when the conditions of (a) (ii) are complied with, the enhancement must *not* exceed by *more* Not more than two annas in the rupee than *two annas in the rupee* the rent previously payable.² But this rule does not apply to contracts to pay rent at *enhanced rates in consideration of an improvement effected or to be effected by or at the expense of the landlord, and to the benefit of which the raiyat is not otherwise entitled.* Except on ground of (1) improvement. But such a contract shall be operative *only when the improvement has been effected, and so long as it exists* and substantially produces its estimated effect in respect of the holding, except when the raiyat is chargeable with default in respect thereof.³ In other words, to make the tenant liable for an enhanced rent for an improvement it must appear—(a) that it is in respect of the holding, (b) that it has been or is to be effected by or at the expense of the landlord, (c) that the tenant was not otherwise entitled to its benefit, (d) that it must be actually carried out, (e) that the liability should last only so long as the improvement exists and substantially produces its estimated effect in respect of the holding in consideration of which the enhanced rent was contracted for, provided, of course, the tenant himself has done nothing to interfere with the improvement.⁴ The land-lord to entitle himself to recover more than the rate indicated above must establish the conditions set forth above.⁵ Evidence as regards improvement effected by the landlord and of the fact that enhancement was agreed to be paid in consideration of improvement is admissible, although the *kabuliat* contained no mention of such improvements.⁶ And in order to make out a claim for enhancement on this ground it is necessary for the land-lord to comply with the provisions of Sec. 33 B. T. Act.⁷

The rule also does not apply to cases where the (2) *raiya*t holds lands at *specially low rates in consideration of cultivating, for the convenience of the land-lord, a particular* Release from obligation to cultivate particular crop.

¹ *Ganesh v. Lachmi*—23 C.L.J. 209—34 Ind. Cas. 783.

² B. T. Act. S. 29 (2).

³ *Ibid*, S. 29, Proviso (ii).

⁴ *Ibid* S. 29 Prov. (ii). *Amir Ali and Finucane B. T. Act*, 1st Ed. 161.

⁵ *Rama v. Joti*—11 C. L. J. 1.

⁶ *Provut v. Chirag*—4 C. L. J. 320=33 Cal. 607=9 C. W. N. 62.

⁷ *Gur v. Keshwar*—1 P. L. J. 76.

crop, such as indigo. If the raiyat agrees to pay enhanced rent in order to free himself from that obligation, the above limitation, would not affect the contract.¹ But an agreement to pay an enhanced rent in case the tenant raises a particular crop is not protected by this rule.²

(3) There can be no *contract for enhancement* of rent unless both the parties to the contract are agreed upon one point, namely, that there is to be an enhancement of rent. This does not necessarily imply that the parties are agreed as to what is the amount of rent actually payable before the enhancement. It is thus clear that the operation of S. 29 may fairly be limited to a case where there is actual *contract for enhancement*, which cannot ordinarily take place where there is a *bona-fide dispute*, that is a serious claim, honestly made on the one hand and honestly repudiated on the other, *as to the rent payable*. Such a dispute may be the result of a controversy as to the *area* of land, or the *rate* of rent at which it is held, or both these elements.³

Distinction between where initial rent known and where it is disputed.

This limitation as to enhancement of rent by contract does not, therefore, apply in the case of a contract by which the rent is adjusted or settled in a case of *bona-fide dispute whether as to the rate of rent or as to the area of the land* comprised in the tenancy.⁴ The amount of rent annually payable may vary not only with the *rate of rent*, but also with the *area of the land* comprised in the tenancy.⁵ And there is a distinction between a contract for the enhancement of rent when the *initial rent is known*,⁶ and a contract by which the *rent is adjusted or settled* in a case of *bona-fide dispute as to the amount of rent*,⁷ which may arise from a dispute either as to the *rate* of rent or as to the *area* of the land comprised in the tenancy,—and in these latter cases the limitation provided above does not apply.⁸ Thus an agreement embodied in a *kabuliat* to pay a certain amount of rent entered into by the raiyat as a *settlement of a dispute* as to the nature and character of existing rent, or in other words what had been the amount of rent payable, and to avoid further litigation is not an agreement to enhance within the meaning of S. 29 Bengal Tenancy Act.⁹ But

¹ Act VIII of 1885, S. 29, Proviso (iii).

² *Provati v. Chirag*, 4 C. L. J. 320=33 Cal. 607=9 C. W. N. 62.

³ *Batu v. Manindra*—21 C. L. J. 325—19 C. W. N. 321.

⁴ *Kedar v. Manindra*—11 C. L. J. 106.

⁵ *Ibid.*

⁶ *Provati v. Chirag*—11 C. W. N. 62=33 Cal. 607=4 C. L. J. 323.

⁷ *Sheo v. Ram*—18 Cal. 333. *Nath v. Damri*—28 Cal. 90.

⁸ See 4 above.

⁹ See 7 above.

a *kabuliat* executed by a tenant in-favour of his land-lord promising to pay future rent at the rate which contravenes the provisions of S. 29, B. T. A. is *void* if as a matter of fact there was no existing dispute between the parties as to the rent payable.¹ When it is shown what the defendant's previous rent was there is no such dispute as takes the case out of the limitations of S. 29. A *kabuliat* executed by an occupancy raiyat at an enhanced rate of rent of more than two annas in the rupee, although executed in consideration of the avoidance of stringent conditions in a previous lease is void.² Avoiding stringent condition in previous lease.

A contract to pay a rent enhanced by more than two annas in the rupee, except in the cases above provided for, is *void in toto and not voidable*³, and such a contract is not severable in character so as to justify the Court in making a decree to the extent allowable by law, that is, to allow so much of the enhanced rent as does not exceed the two annas in the rupee.⁴ Such contract void and not severable.

The land-lord of an occupancy raiyat cannot recover rent at the rate at which it has been paid for a continuous period of not less than three years, immediately preceding the period for which the rent is claimed, if such rate exceeds by more than two annas in the rupee the rent previously paid by the raiyat. The proviso (i) does not control clause (b) of S 29.⁵ Thus continuous realisation of rent at an illegal rate is of no avail to the land-lord when he seeks the assistance of the Court.⁶ Effect of payment for three years.

The onus of proving that a *kabuliat* contravenes the provisions of S. 29 (b) Bengal Tenancy Act is upon the tenant.⁷ In order to attract the provisions of S. 29 of the B. T. Act it is necessary to shew that there was an *enhancement* of rent, and for that purpose it is necessary to plead and prove what the rent was prior to the contract.⁸ But when it is shewn what the tenant-defendant's rent was, the *onus* lies upon the plaintiff-land-lord to justify the Onus of proof.

¹ *Manindra v. Upendra*—9 C.L.J. 343=36 Cal. 604.

² *Probat v. Chiraj*—4 C.L.J. 320=33 Cal. 607=11 C.W.N. 62.

³ *Ibid* followed in *Manindra v. Upendra*—9 C.L.J. 343=36 Cal. 604.

⁴ *Kristodhone v. Brojo*—24 Cal. 895 followed in *Ibid*.

⁵ *Bepin v. Kristodhone*—1 C.L.J. 10 F.B.=32 Cal. 395=9 C.W.N. 265 overruling. *Mathura v. Mati*—25 Cal. 781.

⁶ *Nafar v. Rahaman*—23 C.L.J. 580.

⁷ *Luchmi v. Ekdeswar*—13 C.W.N. 181.

⁸ *Kunji v. Raj*—11 Ind. Cas. 940. ~

enhancement claimed in contravention of S. 29 (b).¹ And if the land-lord relies upon the principle of "*Bona fide dispute*" he must establish satisfactorily that circumstances exist which render the provisions of the statute inapplicable. 'The *recital* contained in an agreement executed by a tenant are not conclusive upon matters affected by the instrument. It is obligatory upon the landlord to give *independent evidence* to shew that there was a *bona fide dispute* in existence at the time of the execution of the agreement, the settlement whereof would take the case out of the provisions of S. 29. If it be shewn that the origin and incidents of a tenancy are unknown, the view may very well be taken that there is a *bona fide* dispute as to the amount of rent. But the mere circumstance that the tenant claims that the rent is so much, while the land-lord asserts that it is otherwise, does not conclusively shew that there is a *bona fide* dispute as to rent.²

Agreement
as a device
to defeat
S. 29.

The provision of S. 29 (b) applies not only to contracts executed at the time of the enhancement but also to contracts executed *some years before*. Where a *Kabuliat* for a term of years begins with a tabular statement which shews the rent to be Rs. 57-4, out of which Rs. 17-2 is *remitted for some unexplained reason* and the remaining rent is fixed at Rs. 40-2 for the period of the *Kabuliat*, and contains a stipulation that at the end of the term the tenant shall take a settlement at the rate of Rs. 57-4. *Held*—that the rent might have been Rs. 57-4 but the *kabuliat* itself exempts the raiyat from paying this sum, and the sum payable by him was only Rs. 40-2. The practical effect of the *Kabuliat* is that at the end of the term the rent of the raiyat is enhanced by considerably more than two annas in the rupee the sum which has been payable by him during the term. The *Kabuliat* is therefore a *colourable evasion of the statute*—a device by which the landlord is able to enhance the rent of the raiyat contrary to law and is not enforceable.³ In a *Kabuliat*, it was stated that the rent of the holding was Rs. 23 odd, that Rs. 14 odd was to be *kept in abeyance*, and that for three years, the tenant would be liable to pay Rs. 80. At the end of that time, he was to take a fresh settlement and execute a fresh *Kabuliat*, and if he did not do so, he was to be liable for rent at the rate of Rs. 23 odd. After the expiry of the period, no fresh settlement having been taken by the tenant, the land-lord sued for the rent at the higher amount.

¹ *Manindra v. Upendra*—9 C.L.J. 343=36 Cal. 604.

² *Ram v. Gokul*—12 Ind. Cas 589.

³ *Mahamaya v Kishore*—18C. L.J. 502=18C. W. N. 736.

Held—that rent being defined as what was lawfully payable in money, the amount payable during the first three years of the tenancy was Rs. 8 odd; that if at the end of that time, the land-lord desired to realise rent at Rs. 23, that was an enhancement of rent, that the stipulations in the *Kabuliat* were a mere device to defeat the provisions of Sec. 29 of the B. T. Act, and that the land-lord was entitled to decree for rent at Rs. 8 odd only.¹

But where a *Kabuliat* executed after the B. T. Act came into force which was to have effect for three years, the amount of rent was stated to be Rs. 19 odd, but it was provided that a *hajaj mah-kub* (deduction) of Rs. 10 odd was to be allowed till the end of the term, but that on the expiry of the term, the full *jama* of Rs. 19 odd was to be paid, and the land-lord sued upon the *kabuliat* to recover arrears of rent for three years after the expiry of the term at Rs. 19 odd, but the tenant did not set up any case that the document was never intended to be acted upon, and nothing in regard to the conduct amongst themselves was placed by the parties for determination before the Court. *Held*—upon a construction of the *kabuliat* that the suit was not for enhancement and that S. 29 B. T. Act was no bar to the recovery by the land-lord at the rate claimed.²

Allowance for a term at end of which full rent payable

It is open to the parties subject to the provisions of S. 29 B. T. Act to come to an agreement to the effect that for a certain number of years the tenant would pay at a prescribed rate, and the years following at a higher rate. But where the increased rate of rent is not the proper consideration for the occupation of the land by the tenant but is intended to be enforceable only if the tenant defaults to execute a fresh *kabuliat* or claims an occupancy right in the land, the agreement to pay the enhanced rent is consequently rather in the nature of a penalty i.e. intended not to be enforced but only to be used as a threat to compel the tenant to execute the *kabuliat* and is not enforceable in law.³

Agreement by way of penalty

S. 29 B. T. Act clearly implies that the land held by the occupancy raiyat remains unchanged, the only variation is in the amount of money rent paid by him in respect of the land comprised in his holding. Where the rent is assessed for excess land as also for new lands taken by the tenant and one consolidated rent is assessed for all the lands, there is in essence a new holding created and no question arises as to the enhancement of rent payable

Addition of new land to old holding

Consolidation of tenancies and of rent.

¹ *Khitish v Girja*—15 Ind. Cas. 878.

² *Romes v Golam*—19 C. W. N. 887.

³ *Mir v Karu*—18 C. L. J. 95=21 Ind cas 443, following.

by the tenant. Whether there has been, in substance a new holding created, in supercession of the original holding, is a question which must be answered with reference to the circumstances of the individual case; the matter is one of substance, not of form; the court must determine whether a new holding has been created, though it may include the land of the original holding, or whether the parties had recourse to a colourable device to evade the provisions of S. 29. If the court comes to the conclusion that a new holding has been constituted by the *substantial addition of new lands to those of the original holding*, S. 29 has application to the new consolidated rental. Thus, where five bighas of new lands were added to the original seven bighas and a consolidated rent was settled by a new contract, a new holding was clearly created by that instrument, and the new rental is plainly not an enhancement of the original rental.¹

Splitting up
one holding
into several
and distribu-
tion of rent
over the
same.

Where the land is held under *several land-lords jointly* and the tenants executed fresh *distinct Kabuliats in favour of the different land-lords* by which they undertook to pay to them a much larger sum than what they used to pay, as the land remained the same as before and as no new tenancy was created, the *Kabuliat* contravened the provisions of S. 29. Thus if A holds 16 bighas under X and Y for Rs. 16 a year, the maximum enhancement to which he can consent is Rs. 2. If he executes a fresh *Kabuliat* in favour of X and agrees to pay him for his share of the land more than Rs. 9, the agreement is void.² If the total rent remained unaltered its *distribution by agreement of parties over different parcels* of land did not constitute enhancement within the meaning of S. 29 B. T. Act. Thus, where the defendant held under the plaintiff and his co-shares one holding for which Rs. 80 was annually payable, but subsequently there was partition among the superior land-lords and the consequence was that the disputed land fell into the share of the plaintiff and by agreement of parties Rs. 16-4 was fixed as the fair rent payable in respect thereof, but when this partition and distribution of rent took place, the rent of Rs. 80 was not enhanced from Rs. 80 to a higher sum, though Rs. 7 payable as annual rent in respect of this land, there was no enhancement in contravention of Sec. 29.³

¹ *Raj v. Faizuddi*—22 O L.J. 81: see also *Taramani v. Safatulla*—22 Ind. Cas. 854.

² *Raj v. Faizuddi*—22 C.L.J. 86.

³ *Rowshan v. Shyama*—20 C.L.J. 328.

S. 29 applies only where the holding remains *constant*. Thus where a holding was originally held jointly by several tenants and by mutual agreement of the parties some lands were excluded from the holding and the remainder was divided into several parcels one to be held by each and a rent was fixed for each, the original holding was split up into several new and distinct tenancies. Consequently, no question can arise as to the effect of S. 29 on the transaction.¹

A claim for addition rent on the ground that the tenant had *converted pasture lands into arable* lands and that by contract between the parties and by local custom such lands were liable, to pay more rent than pasture lands is not one for enhanced rent under S. 29.²

Conversion of pasture with arable.

Enhancement under the section means enhancement of the *same kind of rent*. Thus the conversion of *nukdi* into *Bhaoli*³, or the *cash* rent into *rent in kind*³ cannot be regarded as an enhancement within the meaning of the section. For the conversion in these cases related only to the *medium* by which the rent was payable.⁴ But the *addition to money rent by paddy rent* the value of which exceeds the proportion of 2 annas in the rupee is within the mischief of S. 29.⁵ And where an occupancy raiyat held lands at a money rent and subsequently executed a *Kabuliat* by which he agreed to hold the same lands at a *fixed produce rent or in lieu thereof a certain sum* of money which was far *in excess* of what is allowed by law, it has been held that there was a violation of the provisions of S. 29 B. T. Act. For the practical effect of the *Kabuliat* was that the original rent was increased under the *cloak of a commutation*, and there was no mere change of form but an enhancement of rent under a false description.⁶

Conversion of one kind of rent into another.

The provisions of S. 29 B.T. Act govern the relations between the *co-sharer land-lords* and the tenants just as they govern the relations between *sole* land-lords and their tenants.⁷

Co-sharer land-lord.

Under the B. T. Amendment Act special provision has been made against agreements or compromises filed before a Court or Revenue Officer which, if embodied in a contract between land-lord and tenant could not be

Compromise of suits between land-lord and tenant settling and against above

¹ *Nazir v. Jyatindra*—22 C.L.J. 88.

² *Rameshwar v. Kanchan*—1 C.L.J. 78n.

³ *Hussan v. Nakcheddi*—33 Cal. 200.

⁴ *Gobind v. Banarasi*—18 C.L.J. 74.

⁵ *Kishori v. Ujir*—37 Cal. 610.

⁶ *Tarap v. Kalipada*—23 C.L.J. 635=34 Ind. Cas 97.

⁷ *Ram v. Ekadashi*—10 C.L.J. 87.

enforced under the Act. Thus it is provided that where any agreement or compromise made for the purpose of settling a dispute as to rent payable is filed before a Revenue Officer or in Court, the Revenue Officer or Court is required, in order to ascertain whether the effect of such agreement or compromise is to enhance the rent in a manner or to an extent, not allowed by Sec. 29 in the case of a contract, to record evidence as to the rent which was legally payable immediately before the period in respect of which the dispute arose. And the Court or the Revenue Officer is not allowed to give effect to any agreement or compromise, the terms of which, if they were embodied in a contract, could not be enforced under this Act.¹ This enquiry is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute which the Revenue Officer (or court) would be called upon to decide on the merit but for the agreement or compromise. These rules therefore do not apply to a case where the contract between the parties has been made *before* the settlement proceedings or suits². In the opinion of Mr Justice Rampini apparently the rulings as to the effect of agreements entered into with the object of settling disputes as to the rent payable have been set aside by the amendment³. But with all respect to his Lordship it may be permissible to point out, as has been held in the case referred to, that such agreements do not come within the meaning of agreement to enhance under S. 29.

II.
Enhancement by
suit.

The grounds upon which the landlord can enhance *by suit* the money rent of the occupancy raiyat are given below.

(i)
Rate of rent
below pre-
vailing rate.

The *first* is that the rate of rent paid by the raiyat is *below the prevailing rate* paid by occupancy raiyats for lands of a similar description and with similar advantages in the same or in the neighbouring villages, and that there is no sufficient reason for his holding at so low a rate⁴

1.
Principle of
prevailing
rate.

The *prevailing rate* in Bengal is a historical survival of the old *pargana rate*. The basis on which it rests is practically the axiom that, under the ancient common or customary law of the land the land-lord was entitled to enhance the rent of any tenant up to the customary or *pargana rate* for the class of land held by the tenant, unless there were special reasons why he should hold at a lower rate. The

¹ Act VIII of 1885 as amended by Act I of 1907 B.C., S. 109 B. and S. 147 A.

² *Batu v. Manindra*—21 C. L. J. 325—19 C. W. N. 32.

³ Rampini's *Bengal Tenancy Act*, 4th Edition, 130: *Manindra v. Upendra*—9 C. L. J. 843.

⁴ Act VIII of 1885, S. 30.

presumption was that all land should be held at the customary or usual rate whenever such a rate was found to exist. But elaborate enquiries made when the B. T. Bill was under consideration, shewed that except in special tracts, *pargana*, or customary or uniform soil class rates of any sort had ceased to exist. "The prevailing rate" was however still retained as a ground of enhancement, for what it was worth.

At first there was no definition of the expression "*prevailing rate*" given in the Act, and the Civil Courts and the Revenue Officers, being by law bound to confine their enquiries and comparisons of rates to the same village, a decision of the High Court declared that a prevailing rate was *not an average rate*, but the rate *actually paid and current* in the village for lands of a similar description with similar advantages,¹ and the view taken by the Special Judges generally was that a prevailing rate was a *uniform rate paid by a majority* of the raiyats for lands of the same class in the village.² The interpretation so put rendered it inoperative in practice as a ground of enhancement.

Meaning of prevailing rate.

Rate paid by largest number of raiyats.

To remove these difficulties, without at the same time endangering the interest of the tenants by making an *average rate* a prevailing rate, thus rendering it possible to level all the lower rates up to such average rate, while maintaining all the higher rates, however in excess they may be of the average rate, "when the Act was amended an entirely different and new axiom was propounded as the basis of the prevailing rate, *namely* 'the fact that a tenant without sufficient reason pays a lower rate than his fellows is a most just cause for enhancement,' and S. 31A which was added was based on the axiom. Under it there is no question of a "historical survival"—"no *pargana* rate in the sense of a rate that is actually prevalent"³. By it the area for comparison of rates has been enlarged while an attempt is made to define what is meant by "*prevailing rate*."⁴ Now the rates to be determined is the rate of land in the same or in neighbouring villages.⁵

New definition added to B.T. Act—its principle.

The legislature abandoned the principle laid down in the rulings of the High Court already referred to the effect that

¹ *Shital v. Prasanna*—21 Cal. 986.

² Statements of Objects and Reasons of the Bill of 1898 to amend B. T. Act.

³ Finucane and Amir Ali's *B. T. Act*, 1st Ed. 177.

⁴ Statements of Objects and Reasons of the Bill of 1898 to amend B. T. Act.

⁵ Act VIII of 1885 as amended by Act III B. C. of 1898, S. 30.

the prevailing rate is that paid by the *majority* of the raiyats in the village and prescribes that the *highest of the rates* at which and the rates higher than which the *major portion of the lands* of any area is held, may be taken to be the prevailing rate. This is a new departure in two respects, viz. (a) that the prevailing rate is now defined not with reference to the *number of raiyats* paying rent, but with reference to the *quantity of land* for which rent is payable; and (b) that it enables the *highest of rates* in the ascending scale of rates, at which and at the rates higher than which the *major portion of land* of a similar description and with similar advantages in the same village or in neighbouring villages is held, to be taken as the prevailing rate; so that in time all lesser rates may be raised to this rate¹. The *prevailing rate*, as defined in S. 31A, may be a rate that is paid only by a *single field*, being the rate at which and above which the larger portion of the land in the area taken for comparison is held. The *area and not the number* or proportion of the tenants who hold at a given rate is to be looked to in determining the prevailing rate. To take an extreme case, if the area selected for comparison were 100 *Bighas* and 50 *Bighas* were held by a single tenant at Rs. 2-8 and 1 *Bigha* at Rs. 2 per *Bigha* while the remaining 49 *Bighas* were held by 40 tenants at Rs. 1-8, still Rs. 2 would be the prevailing rate under 31A, as the larger portion of the area, 51 *Bighas* is held, at that and a higher rate.²

Facility of
enhancement.

It is also said that under this definition a prevailing rate would always be found where rates exist at all and that its effects would be to greatly *facilitate the enhancement* of rents; but as rents were known to be already too high in certain districts, power is taken by Government to withhold the operation of the definition from any district or part of a district. In order to guard against all the rates being levelled up to the maximum rate, by manipulation of new prevailing rates from time to time, it is provided that a prevailing rate once determined shall not be liable to enhancement except on the ground of rise in prices.³ Where it was found that there was *no prevailing rate*, and that the raiyats, except in a few isolated cases, holding similar land in the village pay rent at *varying rates*, and do not pay one uniform rate, it has been held that there is

Where no
prevailing
rate.

¹ Rampini's *Bengal Tenancy Act*, 4th Ed. 143.

² Finucane-Amir Ali's *B.T. Act*, 1st Ed. 177.

³ Statements of Objects and Reasons of the Bill of 1898 to amend B.T. Act: Act VIII of 1885 as amended by it, S. 31 B.

no rule which prevents the Court from taking under such circumstances the *lowest rate* as the prevailing rate¹. Where there are *different kinds of land*, and the majority of tenants holding lands similar to those of the defendant paid a higher rate, the higher rate was held to be the prevailing rate.⁴ The adoption of the lowest rate as the prevailing rate, if the landlord does not object cannot be challenged by his tenants.² If the rents of similar holdings in the neighbourhood have been fixed in contravention of S. 29 of the Act, they might be excluded from consideration in suits for enhancement of rent.³

As is well known, each village has lands of various descriptions, with particular names indicative of their crop-yielding capacities; some lands are better situated than the others. In judging, therefore, of the prevailing rate the Court or the Officer called upon to determine the question of enhancement, has to bear in mind the question of *similarity both in the character or description of the lands* held by the raiyat and the *relative advantages* of the lands. The point for determination however is a question of fact.⁴

2
Lands must be similar.

Rules are given for determining enhancement on this ground.⁵ The rates for *three consecutive years* immediately prior to the institution of the suit must be taken into consideration and it must be shewn that there is a *substantial difference* between the rate paid by the raiyat and the prevailing rate found by the Court. It is not every slight difference that would warrant a sum for enhancement. The rate to be considered must be "*generally paid*" that is to say, paid by the majority of the occupancy raiyats.⁶

3
Three years rent.

In Bengal and other places, raiyats belonging to the *higher castes* sometimes claim to *hold land at special rates* of rent; often *particular families*, as a matter of fact, are allowed to hold at favourable rates, and unless it is proved that by local custom caste does form an element for consideration, the caste of the raiyat would not be taken into consideration in determining the rate payable by him. Such local custom must be applicable to a *class*, or, to use the phraseology

4
Caste rates.

¹ *Alif v. Raghunath*—1 C. W. N. 310: *Ram v. Babu*—21 C.L.J. 483 See *Harihar v. Ajur*—22 Ind. Cas. 604.

² *Mangni v. Seo*—1 C.W.N. CLXXIX.

³ *Nabin v. Kulo*—14 C.W.N. 914 (*Semble*) = 37 Cal. 742. *Lalit v. Hitarian*—15 C.W.N. LVI.

⁴ *Finucane and Amir Ali's B.T. Act*, 1st Ed. 170.

⁵ Act VIII of 1885, S. 31.

⁶ Act VIII of 1885, 31 (a). *Finucane and Amir Ali's B.T. Act*, 1st Ed. 177—178.

of the Act, a "description of raiyats."¹ But such rate ought not to be considered in determining the prevailing rate to be paid by the majority of the raiyats.²

5
Landlords'
improvement.

Rates may have increased within a certain area in consequence of *improvements* effected by the landlord. These are exceptional rates which cannot be regarded as a test for determining the ordinary prevailing rates in the village or in the neighbouring villages.³

If the rent is not separately allocated to the different classes of land comprised in the holding, the court can deal with the area of each class separately and arrive at the total rent to be paid by the raiyat.⁴

Appointment
of Commis-
sioner.

Where the court considers that the prevailing rate cannot be satisfactorily determined without a local enquiry it can appoint a Revenue Officer as Commissioner for that purpose.⁵

6
No sufficient
reason for
holding at
low rate.

Before awarding enhancement, the Court must also find that "there is no *sufficient reason*" shewn by the raiyat "for his holding at so low a rate." Sufficient reason for raiyats' holding at exceptionally low rates would seem to be that they hold the land on reclaiming or *Jangalburi* leases or have reclaimed the land⁶ or that they belong to classes of raiyats which, in accordance with local custom, is allowed to hold land at favourable rates of rent⁷ or that they may hold land at favourable rates in consideration of their growing special crops for the landlord⁸ or for rendering him certain services.

Jangalburi
leases.

(ii)
Rise in price
of food crop.

The second ground is "a *rise in the average local prices of staple food crops* during the currency of the present rent."⁹ A rise in the *value* of the produce which includes other value than money value¹⁰ was under the old law a ground for enhancement, but at present it is a rise in the *price*, that is to say, money value. A rise in the price must

¹ Finncane and Amir Ali's B. T. Act, 1st Ed. 180 and Act VIII of 1885, S. 30(c).

² *Ibid* S. 31(e).

³ *Ibid* S. 31(d).

⁴ *Ibid* S. 31(f).

⁵ *Ibid* S. 31(b).

⁶ *Nur v. Hari*—2 W. R. Sp. (1884) Act X, 75: *Chudhri v. Gour*—2 W. R. (Act X) 40: *Paramananda v. Paddamani*—9 W. R. 349. *Surasundari v. Golam*—19 W. R. 141: *Hara v. Janmajai*—9 Cal. 505=12 C.L.R. 257.

⁷ Act VIII of 1885, 31(c).

⁸ *Ibid* 29 Prov. (iii).

⁹ Act VIII of 1885, Sec. 30(b).

¹⁰ Rent Commission Report, 37.

now be of *food crops*, and not any *special crops* grown by the raiyat, *e.g.* jute, sugarcane, betel-leaf, tobacco and the like, which requires particular attention and involves special expenditure, and the prices of which, if for export, may fluctuate with the fluctuations of foreign markets, and cannot therefore furnish a safe test for judging of the ability of the raiyat to pay enhanced rent. Under the former law also special crops were not taken into consideration in settling rent.¹ Where in a certain area *two staple food crops* are grown on all the lands, in decreeing enhancement, the mean or average of the increase of the prices should be taken into consideration². Under the old law it was held that the increase in the value of the produce must be an increase in its *natural and usual value in ordinary years*; the *accidental and exceptional prices of a particular year* in consequence of drought and scarcity, could not be treated as a measure by which rent was to be adjusted;³ and that the increase must be a *permanent* one; that is a *steady and normal* increase, and not one that fluctuates in a violent and uncertain way and is affected by extraordinary causes not likely to last.⁴ The present Act also refers to '*average*' prices and the above conditions therefore hold good as much now.

Average price.

In settling the rate of enhancement under § 30 (b) B. T. Act, the Court must have regard to the *nature of the land* in which rent is to be assessed. If it is an up-land the prices of the up-land staple crop must be considered and while if it is low, the prices of the low-land staple crop must be considered⁴.

Provision has now been made for the preparation of price lists of the market prices of staple food crops which thus facilitates the ascertainment of its rise for purposes of enhancement and the local Government is given power by rule to determine what are to be deemed staple food crops in any local area⁵.

S. 30 B. T. Act refers to a tenancy where the rent is solely payable in money and it does not apply to a tenancy of which rent is paid partly in cash and partly in kind⁶.

The Court is bound to look to the price list so prepared⁶.

¹ Finucane and Amir Ali's B. T. Act, 1st Ed. 172: Rampini's Ditto 4th Ed. 137.

² Bhagrath v. Mahsoop—6 W. R. (Act X) 34.

³ Thakurani v. Biessessur—B. L. R. 9 F. B. 326 W. R. (Act X) 29: Harihar v. Ajuri, 22 Ind. Cas. 604.

⁴ Sajiwan v. Gulub—1 P.L.J. 409—35 Ind. Cas. 678.

⁵ Act VIII of 1885, S. 39.

⁶ Priyanath v. Tarini—24 C.L.J. 373—35 Ind. cas. 618.

Rules for determining enhancement.

Rules are given for determining enhancement of rent on this ground.¹ Under Act X of 1859 it had been held that the old rent must bear to the increased rent the same proportion as the former value of the produce of the soil, calculated on an average of 3 or 5 years next before the date of the alleged rise in value, bears to the present value.² The rule of proportion thus enunciated was vague and indefinite, while the period of time indicated for purposes of comparison was much too short. Nor did the rule take into account any increase in the cost of production. These defects have now been remedied.³ *First*, the court has ordinarily to take into consideration decennial periods for purposes of comparison, which should be *entirely distinct* and should not even partially overlap each other⁴; *secondly*, the rule is applicable to money rents; and *thirdly*, a deduction of one-third of the excess over the last average is mandatory to cover probable increase in the cost of production.⁵

(iii)
Increase in
productive
powers.

(1)
Due to
landlord's
improvement.

The third ground is *increase in the productive power of the land* held by the raiyat on account of "improvement effected by, or at the expense, of the landlord during the currency of the present rent" or "by fluvial action."⁶ This ground of enhancement is subdivided into two, *viz.*, landlord's improvement and fluvial action, which alone, in the opinion of the framers of the Act, "can bring about an increase in the productive powers of the land so as to justify an enhancement of rent." "All other cases"—it was said "seem to resolve themselves into cases such as railways or canals, in which the landlord will get his enhancement by improvement of prices, or else into improvements effected by Government or by the raiyat."⁷ The increase must be *independently of the raiyat's own agency and expense*. The old law also required the increase to be "otherwise than by the agency or at the expense of the raiyat."⁸

Onus.

The onus of showing that the productive powers of the land had increased independently of the raiyat's agency is on the landlord.⁸

¹ Act VIII of 1885, S. 82.

² *Thakurani Dasses v. Bisheshur*—3 W.R. (Act X) 29=B.L.R., F.B.
202.

³ Finncane and Amir Ali's B.T. Act, 1st Ed., 186.

⁴ *Annada v. Nilbarani*—11 C.L.J. 380.

⁵ Act VIII of 1885, S. 32, and 3 above.

⁶ *Ibid.*, S. 30 (c) & (d).

⁷ Selections from Papers relating to B.T., Act (1886) 415.

⁸ *Poolin v. Watson*—9 W.R. 190.

No enhancement can be granted under this rule unless the improvement by the landlord is registered.¹

Rules for determining.

Rules are given for determining the amount of enhancement claimed on this ground. In determining the same the Court shall have regard to:—(a) the increase in the productive powers caused or likely to be caused by the improvement. The ground is not restricted to increase *already caused* but the claim may be based on the *likelihood* of increase, which, however, must not be *hypothetical* but must be *capable of ascertainment* with a fair degree of certainty; (b) the *cost* of the improvement and the cost incurred by the raiyat *for utilising it*. In some cases the cost of making an improvement may be trifling, in others the raiyat may have to incur himself considerable expense in making use of it. So either the one or the other or both of these circumstances will have an important bearing in determining the amount of enhancement; (c) the *existing rent* and the *capacity of the land to bear a higher rent*. For the rent may be too high and in spite of the improvement, the land may not be capable of bearing an increase in its burden. Even when a decree for enhancement on this ground has been obtained by the landlord, the tenant or his successor in interest (who may be either his heir or his assignee in case the holding is transferable) is entitled to reconsideration of the same in the event of the improvement *ceasing to produce* the estimated effect, or, if the effect was of a prospective character, not producing it at all.²

Amount of enhancement.

The enhancement granted should include a sum in addition to the interest payable upon the capital spent by the landlord for the improvement. The enhancement agreed to by the tenant may be taken *prima facie* as his own estimate of what would be fair rent under S. 30 (c), and the Court may well adopt this as the basis for a decree, till at any rate, the tenant shows that his estimate was erroneous.³

Increase in the productive power of the land due to *fluvial action* is also a ground for enhancement. Fluvial action includes a change in the course of a river rendering irrigation from the river practicable when it was not so previously.⁴ The Court shall not take into account any increase in productive power due to it which is

(2)

Due to fluvial action.

¹ Act VIII of 1885, S. 33 (a).

² Act VIII of 1885, S. 33: Amir Ali & Finucane's B.T. Act, 1st Ed., 187—188.

³ Ganesh v. Lachmi—23 C.L.J. 209.

⁴ Act VIII of 1885 S. 30, Explanation.

merely *temporary and casual*¹. Rule is given as to the amount of enhancement on this ground. Although the court may enhance the rent to such an amount as it may deem fair and equitable, the amount must in no case give to the landlord more than one-half of the value of the "net increase, in the produce of the land".²

Must be gradual and not within 15 years.

Even when the landlord becomes entitled to an enhancement of rent for any of the above reasons, to prevent hardships to the raiyat provisions have been made empowering Court to direct that the enhancement shall be *gradual*, that is, yearly by degrees for any number of years not exceeding five.³ And when the rent has once been enhanced no suit for enhancement will be entertained *within fifteen years*.⁴ And in no case can an enhancement be decreed which is under the circumstances of the case *unfair or inequitable*.⁵

Duration of enhancement.

The enhanced rent can continue only *so long as the improvement exists and substantially produces its estimated effect* in respect of the holding and a time must come when rent would have to be reduced to the original rate. It is open to the tenant at a future time to establish that the rent should not be decreed at the enhanced rate, because the improvement either no longer exists or does not substantially produce the estimated effect in respect of the holding. It is obviously just that if the improvement has ceased to exist *in part* only there should be a corresponding reduction in the enhanced rent.⁶

Increase in area.

Under the old law and under the present the raiyat's rent could also be enhanced on the ground of an *increase in area* of the land held by him. This properly speaking is not a ground of enhancement but is a case of alteration of rent and will be dealt with under that head.

Who may sue for enhancement?

Suit for enhancement of rent on the grounds specified above must be brought by *all* the landlords, and cannot proceed at the instance of some only of the fractional cosharers.⁷ S. 7 of the Act does not apply to the enhancement of the rent of an *undivided share* of a holding.⁸ A farmer⁹, or an *ijardar* when there is no

¹ Ibid, S. 34(a).

² Ibid, S. 34(b).

³ Ibid, S. 36.

⁴ Ibid, S. 37.

⁵ Ibid, S. 35.

⁶ *Ganes V Lachmi*—23 C.L. J. 209.

⁷ *Gopal v. Umesh*—17 Cal. 695 : *Boidyr v. Ilm*—2 C. W. N. 44=25 Cal. 917 : See also Act VIII of 1885, S. 188.

⁸ *Haribul v. Tasimuddin*—2 C. W. N. 680.

⁹ *Durga v. Golak*—23 W. R. 228.

stipulation in his lease precluding him from so doing,¹ a Hindu widow whether suing as widow of her late husband or as guardian of her minor son² may bring such a suit.

In a suit to enhance the rent of an occupancy raiyat, Court fee. the amount of the fee payable is computed according to the amount of rent of the land to which the suit refers, payable for the year next before presenting the plaint.³

A decree for enhancement, if passed in a suit instituted Date from which decree takes effect. in the first eight months of the agricultural year, ordinarily takes effect from the commencement of the next agricultural year ; if passed in a suit instituted in the last four months of the agricultural year, it ordinarily takes effect on the commencement of the next year but one following : but a later date may for special reasons be fixed by the court.⁴

The rent of an occupancy raiyat cannot be enhanced by the auction-purchaser at a sale of an estate sold for arrears of Government Revenue. The Revenue Sale Law provides that nothing herein contained shall entitle any such purchaser to enhance the rent of any raiyat having a right of occupancy otherwise than in the manner prescribed by the law for the time being in force.⁵ The matter has been discussed more fully in a previous chapter and further treatment thereof is unnecessary.

In the case of arrears of rent being due from *pulni* or other dependent *talugs* or tenures, the law at first provided for the sale of those only which, by the title-deeds or established usage of the country, were transferable by sale or otherwise. It did not, however, in express terms, say whether they were to be sold free from or subject to incumbrances, which might have been created by the former holder.⁶ The *Astam* Regulation S. 8 and 11 for the first time, laid down that on a sale held under its rules, they were "sold free from all incumbrances that might have accrued upon them by the act of the defaulting proprietor or his representatives or assignees, unless the right of making such incumbrances should have been expressly vested in the holder by a stipulation to that effect in the written engagements under which they might have been

¹ *Durga v. Jainarain*—2 Cal. 474. P. C.

² *Surja v. Hemanta*—20 Cal. 498.

³ Act VII of 1870, S. 7 (xi).

⁴ Act VIII of 1885, S. 154.

⁵ Act XI of 1859, S. 37, *Proviso* as explained by *Sarat v. Asiman*—31 Cal. 725.

⁶ Reg. VII of 1799, S. 15, cl. 7.

held." But it protected the tenure of "*khud kasht raiyats* or resident and hereditary cultivators" and all "*bona fide* engagements made with them by the late incumbent (the former proprietor) or his representative" for rents which were as high as were "demandable at the time such engagements were contracted." But it was not at that time, expressly stated whether on *sale by any other process*, the tenure was similarly sold. And consequently Reg. I of 1820 was passed to clear up the doubt, which provided that whether the sale was made under the provisions of the *Astam Regulation* or under the summary process authorised by the general Regulations, the sale was subject to S. 11 of Reg. VIII of 1819. Still the law was confined to the tenures of the nature defined in S. 8 of Reg. VIII. This was the state of the law when Act X of 1859 was passed which incorporated all the previous law on the subject in respect of tenures of that description. There was, however, no law in force by which *tenures other than those above described*, that is, tenures which were transferable by the custom of the country could be sold with that effect. This omission was supplied by Act VIII of 1865 B.C. which enacted that all tenures sold under its provisions were to be sold free from all incumbrances, but subject to the proviso which was in the same words as that enacted in Reg. VIII, S. 11, Cl. 3.¹

Thus it appears from what is stated above that though on a sale of a tenure under the provision of the Regulation VIII and other cognate law the auction-purchaser did not acquire the right to collect rent at a higher rate than was demandable without establishing his right to do so by a regular suit in a Court of Justice, this protection, as it appears from the language used, extends only to the *resident occupancy raiyats* who can be included within the term "*khud kasht raiyats*", but not to the *non-resident raiyats* of the village, who may have acquired occupancy right in respect of their holdings in that village and who were formerly distinguished from the *khud kasht raiyats* by the name of the *pai kasht raiyats*.

(iv). *Reduction of rent.*

Reduction of
rent.

From the grounds given by the Act entitling the landlord to claim an enhancement of the rent follow the converse grounds which give the raiyat the right to seek for a reduction of his burden. The old law recognised three

¹ *Shahaboodeen v. Futteh*—7 W. R. 260 F. B.—B. L. R. Sup. 646.

grounds on which a raiyat could obtain a reduction or abatement of rent, viz:—(a) diminution of the area, by diluvion or otherwise, (b) a decrease in the value of the produce or of the productive powers of the land, arising from causes beyond the power of the raiyat, (c) when the quantity of land held by raiyat proved by measurement to be less than that for which the rent is paid.

The distinct terms of S. 38 B. T. Act make it quite clear that a reduction of rent cannot be claimed on these grounds under the present law.¹

Now the *first* ground for claiming reduction of rent is that the *soil* of the holding has, without the fault of the raiyat, become permanently *deteriorated* by a deposit of sand or other specific cause, sudden or gradual.² The deterioration must be of a *permanent* or lasting character. It cannot be said that a deterioration is not permanent only because *by the application of capital and skill its cause might be removed*. A liberal interpretation should be put upon the word '*permanently*' and the word construed with reference to existing conditions.³ Thus when a piece of land gets covered with sand, the deterioration is permanent *with reference to existing conditions*, for no human being can tell when it may please a higher power to cause the river to wash away the sand again or to deposit fresh earth upon it, and the case of an absolutely vague and uncertain event like this is even stronger than the example given above of the application of human capital and skill. The more *uncertain the result* the more it must be held to come within the meaning of the word '*permanent*' as construed with reference to existing conditions.⁴ It does not matter whether the deterioration is by a *sudden* cause or has occurred *gradually*, but it must be *without the fault of the raiyat*. If the deterioration was occasioned by the laches on the part of the raiyat himself, he would have no right to relief under this section.⁵

The *second* ground is that there has been a *fall, not due to a temporary cause, in the average local prices of staple food crops* during the currency of the present rent.⁶ The explanation of this ground will be found from what has been already said as to the opposite ground for enhancement.

¹ Finucane and Amir Ali's B. T. Act, 1st Ed. 192—193.

² Act VIII of 1885, S. 38 (1) (a)

³ *Gauri v. Reily*—20 Cal. 579.

⁴ *Krishna v. Palakdhari*—22 O. L. J. 42.

⁵ See *Mansur v. Harvey*—11 W. R. 291.

⁶ Act VIII of 1885, S. 38(b).

(3) Rent higher than prevailing rate no ground. An occupancy raiyat cannot sue for a reduction of rent except on one of the grounds specified above. He therefore cannot sue to have his rent abated on the ground that it is *higher than the prevailing rate*. But neither could he do so under the old law.¹

(4) Deficiency in area. A tenant may also obtain a reduction of rent on the ground of a *deficiency* proved to exist in the area of his tenure or holding. But this properly is a case of alteration of rent and will be discussed under that head.

(v). *Alteration of rent on alteration of area.*

Alteration in area. The quantity of land included within the raiyat's holding may be *altered*, that is to say, be increased or diminished from various causes, and it is but meet that the rent payable for the holding should also be *altered i.e. enhanced or reduced* accordingly. The B. T. Act has provided for such a contingency.

Increase in area may be due to (1) Encroachment. Land in excess of the area for which the rent is previously paid may be acquired by a tenant—(a) by *encroachment* on the waste or unoccupied land of the same estate belonging to his landlord; (b) by *alluvion*; or (c) by encroachment on the lands of a third person.²

1. On land of landlord. Possession by a person will be presumed to be held in his own right and adversely to the true owner. But while a tenant, taking advantage of his position as such, takes possession of lands belonging to his landlord not included in his holding, the presumption is that such lands are *added to the tenure and form part thereof for the benefit of the tenant*, so long as the holding continues, and afterwards for the benefit of his landlord, unless it clearly appears by some act done at the time that the tenant made the encroachment for his own benefit.³ An encroachment, therefore, made by a tenant from the adjoining waste of his landlord is *prima facie* made by him in his character as tenant and is *presumed* to have been made *for the benefit of his landlord*.⁴

Presumed for his benefit.

A tenant, who is in possession of land which does not form part of his original holding can be *sued for the use and occupation of such land*.⁵ The tenant must be treated as

¹ *Baban v. Sheb*—21 W. R. 404.

² *Finucane and Amir Ali's B. T. Act*, 1st Ed. 247—248, 246.

³ *Gooru v. Issur*—22 W. R. 246 followed in *Esubai v. Damodar*—16 Bom and 552; *Mathu-Vakkoo v. Orr*—35 Mad 618.

⁴ *Ishan v. Ramranjan*—2 O.L.J. 125 (135); *Birendra v. Lakshmi*—30 Ind Cas 896.

⁵ *Abdul v. Rajendra*—13 C.W.N. 635.

a tenant of the new land, apart from his tenancy in respect of the original holding.¹ It is altogether a new holding and the rent that would be assessed on that land would be new rent in respect of the new holding.² It was held in an earlier case that when lands have been encroached upon and added to the tenure, the tenant, if his tenancy is permanent or he has a right of occupancy, cannot be ejected from them while the tenure lasts, but when the rent is adjusted these lands might be brought into calculation.³ But this view has not been accepted in a later case.⁴

While a tenant is bound (presumed) to treat that which is an encroachment as held by him under his landlord, the landlord is not bound to treat the land on which his tenant encroaches as held under a tenancy, but it is open to him to repudiate the relation and treat him as a trespasser and to evict him as such.⁵

But it does not follow that because the landlord has this option he can treat the tenant as a trespasser at any time after having exercised his option in treating him as a tenant for some time.⁶

But though the landlord may, if he chooses, treat him as a tenant in respect of the land encroached upon, the tenant has no such right to compel the landlord against his will to accept him as a tenant in respect of that land.

It is open to the tenant to indicate at the time he encroaches that he intends to hold the encroached lands for his own exclusive benefit and not to hold them as he holds the lands to which they are adjacent; in this event, the landlord, though willing to treat him as a tenant, may be driven by an ascertainment of hostile title, to a suit to eject him as a trespasser. No doubt, as a general rule, the intention of the tenant to make an encroachment for his own benefit must be shewn at the time when the encroachment is made, but a subsequent severance of the encroachment from the demised premises may have the same effect, if brought to the knowledge of the landlord, although if

¹ Finucane and Amir Ali's B. T. Act, 1st Ed., 275.

² Gooroo v. Issur—22 W. R. 246.

³ Naddiar v. Meajan—10 Cal. 829.

⁴ Gopal v. Lakkhirani—16 C.W.N. 634; Ishan v. Ramranjan—2 C.L.J.

125.

⁵ Prahlad v. Kedar—25 Cal. 302.

⁶ Khondkar v. Mohini—4 C.W.N. 508.

the landlord is allowed to remain under the belief that the encroachment is held as part of the tenancy, the tenant may be *estopped* from denying it.¹ The tenants' possession of the lands encroached upon can only commence to be adverse when a title adverse to the landlord is asserted, or the landlord becomes aware of the encroachment.² Mere *non-payment of rent* for 12 years by a tenant does not convert the tenancy into adverse possession.³ It must be shown that there was not merely possession, but such possession was with notice to the landlord and was known by the parties to be a trespass.⁴

2.
On Land of
3rd party.

The tenant may encroach upon either the neighbouring land of his own landlord or upon that of a *third party*. In the latter case, he makes the encroachment *for his landlord's benefit*, and not for himself, and his landlord is entitled to additional rent for the land so added to the subject of the tenancy.⁵ In this case also the same presumption arises as in case of encroachment made on the adjoining lands of his landlord and the same principle governs the relationship between him and the tenant.

3.
Accretion.

Formerly there was a conflict of rulings as to whether a tenant had any right in land which had *accreted to his tenancy*. But the matter has now been set at rest by a Full Bench decision in which it has been ruled that a *raiyat* who has a right of occupancy is entitled to hold *lands accreted* to his *jote* as an increment to it.⁶ The increment is to be regarded as part and parcel of the parent *jote* and the landlord cannot treat it as a separate tenancy.⁶ As to the landlord's right to rent for such land so added to a tenant's holding, it was held under the former law that he would only be so entitled, provided the tenant was liable by his engagement or by established usage to such an increase of rent.⁷ Now a tenant is, of course, liable to pay additional rent for such land except in the circumstances specified.⁸ The accretion should be assessed at the same rate as the parent holding.

¹ *Birendra v. Lakshmi*—30 Ind Cas 896.

² *Wali v. Tola*—3 Cal 597; *Ishan v. Ram*—2 C.L.J. 125; *Taran v. Ganendra*—16 C.W.N. 235.

³ *Prem v. Bhupen*—2 All 517 F. B.; *Rungo v. Abdul*—4 Cal 314; *Parash v. Kashi*—4 Cal 661: See also *Dadoba v. Krishna*—7 Bom 34; *Tarachuran v. Samsar*—3 Mad 115.

⁴ *Rishna v. Banka*—13 C.W.N. 698.

⁵ *Gaur v. Bhola*—21 Cal 233.

⁶ *Ashanulla v. Mohini*—26 Cal 789.

⁷ Regulation XI of 1825, 4 cl (1): *Ramnidhi v. Parbati*—5 Cal 328; *Ghulum v. Kali*—7 Cal 479; *Brajendra v. Upendra*—8 Cal 706.

⁸ Act VIII of 1885, S. 52(a).

In claiming additional rent the landlord would have to shew that the lands held by the tenant were *in excess* of the lands originally let out to them in consequence of some encroachment or some alluvial increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent which by carelessness, or neglect or some other reason he had hitherto lost.¹ Consequently, the landlord must establish the *area for which rent has been previously paid* by the tenant; he must next establish the *present area* held by the tenant; he is then entitled to claim additional rent in regard to the excess area.² If it is established that the original letting was *not with reference to area* at all, but was a *letting at a (lump) consolidated rent for lands within specified (well-defined and ascertained) boundaries*, the holding being supposed to contain a certain number of *bighas*, and it should afterwards be found, on measurement, that the area expressed in *Bighas* (or whatever the denomination may be) is more than was supposed, it is manifest that there is no excess area for which the tenant is liable to pay additional rent, *the rental agreed upon being for the land included within the boundaries*, whatever the nominal area may be, and no additional rent can be claimed, unless it is shewn that the tenant is in occupation of land situated outside the boundaries prescribed. If however it is proved that the original rent was settled *with reference to the quantity of land let out*, as where land is let at a certain rate *per bigha*, and the area at the time of letting is found to be a certain number of *Bighas*, it manifestly is not a ground for alteration of the rent, that the number of *bighas* has afterwards been found on measurement to have increased or decreased, unless the measurement was made by the *same* standard and by the *same* method. In such a case in order to entitle the landlord to claim additional rent, he must, in the first place, prove what the original area was. If it is found that the tenant is in occupation of a larger area according to the same measurement the tenant would be bound to pay additional rent in respect of the excess land in his possession.³ But if a tenant is let into occupation of *certain quantity of land for a certain lump rent or at a certain rate of rent*,

Where rent settled with reference to lands within specified boundaries.

Where rent settled with reference to quantity of land let out.

¹ *Gouri v. Reily*—20 Cal. 579.

² *Srinibas v. Ramchandra*—14 C.L.J. 146=15 C.W.N. 921.

³ *Rajkumar v. Ramlal*—5 C.L.J. 538.

and if he afterwards acquires *more land* over and above what was originally let, the surplus is the excess area and the tenant is liable to pay additional rent for it; while a tenant is entitled to a reduction of rent in the contrary case. Thus a landlord is entitled to additional rent when he shows—(a) what the *quantity* of land was at the inception of the tenancy: (b) that the *rent* was settled with reference to the area: (c) that no consolidated rent for the entire area let out was settled: and (d) that the quantity of land held at the time of suit is in excess of that originally let out.¹

Question depends upon intention of parties.

It appears, as observed by Coxe J., that “the whole question is one of intention of the parties applicable to the tenancy before the final measurement. If the landlord originally intended to let and the tenant originally intended to take such-and-such a piece of land or such-and-such a holding, *be the number of bighas what it may* the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent. If however he intended to let and the tenant intended to take so many bighas, *be the actual piece of land what it may*, the landlord will be entitled to additional rent when the tenant has proved to hold more bighas than were originally let to him. No doubt when a piece of land with definite boundaries is leased there is plenty of authorities for holding that the description of boundaries will prevail over the statement of the area, and the landlord would in all cases have the burden of proving that the settlement was with reference to area alone.”²

Difficulty of landlord in proving.

“In this class of cases,” as pointed out by Mookerjee J., “the chief difficulty of the landlord is that he is not able to establish the area for which rent has been previously paid by the tenant. Recitals in documents like leases and rent-receipts are by no means conclusive to prove the area previously held by the tenant;—at any rate before a comparison could be made between the area previously held and the area at present found to be in occupation of the tenant, it must be shewn that the measurement on the two occasions was made according to the same standard.” But when it has been proved by measurement by the same system of measurement and under the same

Evidence thereof.

¹ *Rajkumar v. Ramlal*—5 C. L. J. 538.

² *Akbar v. Hira*—16 C. L. J. 182.

³ *Srinibas v. Ramchandra*—14 C.L.J. 146=15 C. W. N. 921; eg. *Gouri v. Reily*—20 Cal. 579: *Rajendra v. Chunder*—6 C.W.N. 318.

conditions, that the tenant is holding a larger number of *bighas* or a larger quantity of land than he has been previously paying rent for, it shall not be necessary for the landlord to prove or point out the *particular plots* which the tenant has acquired in excess, whether by encroachment, alluvion or otherwise.¹

Under the former rent law and rulings thereon all tenants were entitled to *abatement of rent* on the ground of diluvion or *deficiency* proved by measurement in the area of the subject of the tenancy. A tenant with or without a right of occupancy was entitled to an abatement of rent for land washed away, unless precluded by the terms of his *Kabuliat* from claiming it.¹ Now under the B. T. Act nothing in any contract can take away the right of a raiyat to apply for reduction of rent.² A tenant, therefore, cannot now be precluded by the terms of his agreement from claiming an abatement of rent. Abatement could be claimed for land taken up by government for a public purpose, such as for a road³ and on the ground of dispossession by title paramount,⁴ but not if he could not shew that his lessor had title,⁵ nor if he knew that the area of land leased to him was less than that mentioned in his *patta*,⁶ nor if he came into possession of a less quantity of land through his own fault.⁷ The mere *acceptance of a reduced rent* (by the landlord), though it may amount to a full acquittance of rent for particular year or years for which the rent was paid, cannot operate as a binding contract between the parties, without proof of the agreement which formed the basis of the reduction granted, because it is consistent with the reduction being a mere temporary abatement and as an indulgence on the part of the lessor.⁸ Remission may also be claimed not account of land not found in the possession of the tenant, but on account of land which, though included in his tenure, he

Reduction of rent for decrease in area.

Payment of reduced rent.

¹ Act VIII of 1885 S. 52 (5) added by the Amending Act of 1898.

² *Inayatullah v. Ilahi*—W. R. Sp. (1864) Act X. 42.

³ Act VIII of 1885, S. 178(3) (f).

⁴ *Din v. Thakru*—6 W.R. (Act X) 24.

⁵ *Brajanath v. Hiralal*—10 W. R. 120=1 B. L. R. A. C. 87; *Gopananda v. Govind*—12 W.R. 109.

⁶ *Rung v. Rudro*—17 W. R. 386.

⁷ *Tripp v. Kali*—W. R. Sp. (1864) Act X. 122.

⁸ *Sitanath v. Sham*—17 W. R. 418. *Kailash v. Darbaria*—20 C.W.N. 347; See *Durga v. Rajendra*—41 Cal. 493 P. C.=18 C.W.N. 66 P.O. : *Bajinath v. Raghunath*—16 C.W.N. 496.

⁹ *Radha v. Bhawani*—12 C.L.J. 439=6 C.W.N. 60.

was obliged to leave uncultivated on account of the necessity of having to erect embankments to protect other lands where remission for land so left out is provided for in the written contract between the parties.¹

How
obtained.

Under the old law a raiyat entitled to a reduction of rent had three courses open to him. He could either *sue for abatement* of rent or wait till sued by the landlord for rent and then *set up a claim to a set off*, or he might complain of an excessive demand of rent and *sue for a refund*.² S. 52(b) B. T. Act does not explain whether reduction of rent on account of decrease in area can be claimed as a set off or only in a suit brought for the purpose. Finucane and Ameer Ali are of opinion that "Under the present law the right to a reduction of the rent can, it seems, be enforced only by a suit instituted for the purpose. For in an action for rent brought by the landlord there are two issues for determination: (a) what is the amount of rent payable by the *raiya*t and (b) whether it has been paid. And to allow the *raiya*t to raise the question of reduction of rent on the grounds specified above necessarily give rise to totally distinct issues."³ But, as pointed out by Rampini "the words 'every tenant shall be entitled' etc., in S. 52 seem to point to the conclusion that the reduction of rent on this ground may be claimed as a set off. On the other hand, a reduction of rent on the grounds specified in S. 38 B. T. Act would seem to be obtainable by an occupancy raiyat only in a suit instituted for the purpose".⁴

Co-sharer
tenant or
landlord
cannot claim.

A mere co-sharer tenant, who has only a fractional share in the tenure or holding, cannot claim abatement under the section. His remedy is to bring a suit for the purpose making all the joint landlords and his co-sharers in the tenancy parties.⁵ So a suit under this section cannot proceed at the instance of co-sharer landlords in consequence of the provisions of Sec. 188 B. T. Act.⁶

Court-fee
in suit
therefor.

In a suit (a) to enhance the rent of a raiyat having a right of occupancy and (b) for abatement of rent, the amount of court-fee payable shall be computed according

¹ *Sree v. Ishrad*—16 C.L.J. 225.

² Rampini's *Bengal Tenancy Act*, 4th Ed., 149: See also Bell's *Law of Landlord and Tenant*, 2nd Ed., 57 and the cases cited there.

³ Amir Ali and Finucane's *Bengal Tenancy Act*, 1st Ed., 194.

⁴ Rampini's *Bengal Tenancy Act*, 4th Ed., 190—191.

⁵ *Bhupendra v. Raman*—27 Cal. 417=4 C. W. N. 107.

⁶ *Satiprasad v. Radhanath*.—16 C. L. J. 427: *Gopal v. Umesh*—17 Cal. 695.

to the amount of rent of the land to which the suit refers payable for the year next before the date of presenting the plaint.

(vi) *Imposition of Abwab.*

In this connexion it may be relevant to say a few words regarding the attempt often made by the landlord to enhance the rent of the tenant by the imposition of what is called *abwab*. Enhancement by imposition of *Abwab*.

We have already seen that from early times the resident hereditary cultivators were entitled to retain their land as long as they paid the *customary rents* and that the landlords, whenever they wanted to enhance the rents, always thought it necessary to have a distinct name and a separate pretext for each increase of exaction, so that the demand had sometimes come to consist of thirty or forty different items into the nominal rent. This circuitous mode of increasing the payments was resorted to in order to get over the limitation on their right to enhance which the customary rent implied. These various items thus imposed came to be known by the general name of *abwab*. Due to idea of customary rent payable by raiyat.

The British Government had from the earliest times attempted to deal with the evil of *abwabs*. The first attempt to protect the raiyats from these illegal exactions was made in the year 1793, the time of the great settlement when the rights of the landlords themselves were being placed on a permanent basis. Regulation VIII of 1793 laid down that all existing *abwabs* should be consolidated with the *asal jama* into one specific sum,¹ and prohibited the imposition of any new *abwab* or *mathul* upon the raiyats, upon any pretence whatever, upon pain of a penalty of three times the amount imposed for the entire period of imposition.² Regulation V of 1812 which altered some of the provisions of the above Regulation declared that nothing therein contained should be construed as sanctioning or legalising the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathul* or any other denomination.³ The Rent Acts of 1859 and 1869 provided that under-tenants or *raiya*t's, if any sum was exacted from them in excess of the sum specified in the *patta*, whether as *abwab* or any other pretext, Early law dealing with *abwab*.
Reg. VIII of 1793, S. 54,
55.
Reg. V of 1812, S. 3.

¹ Reg. VIII of 1793, S. 54.

² *Ibid.*, S. 55.

³ Reg. V of 1812, S. 3

Case law on
the subject.

were entitled to recover damages not exceeding double the amount so exacted.¹ In spite of these statutory provisions the case-law on the subject did not proceed on a uniform basis, and, as a logical consequence of the rulings, it followed that where the *Zemindar* demanded less over and above the original rent and the *raiyat* consented and contracted to pay it, this *demand and the old rent formed a new rent* lawfully claimable under the contract,² and that certain payments, which were not so much in the nature of cesses, as of rent in kind, and which were fixed and uniform and had been paid by the *raiyat* from the beginning, according to local custom were not illegal cesses.³

B. T. Act,
S. 74.

In this state of the law, the B. T. Act provided that "all impositions upon tenants under the denomination of *abwab*, *mithat*, or other like appellations *in addition to the actual rent*, shall be illegal, and all stipulations and reservations for the payment of such shall be void."⁴ A Full Bench of the High Court upon a review of the previous legislation on the subject and the entire history of *abwabs* came to the conclusion that—"Nothing could be recovered for the occupation of land except one sum which must include everything which was payable for occupation, arrived at either by agreement or by some judicial determination between the parties; and any contract, whether express or implied, to pay anything beyond that sum under any name whatever, for or in respect of the occupation of the land, could not be enforced."⁵

What is
abwab.

The question what is or is not *abwab* must depend upon the circumstances of each particular case in which the question arises.⁶ If the particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is *part of the rent, although not described as such*, the landlord would be entitled to recover the same, and the whole question in any case is whether the items claimed are really part of the rent which was the consideration for the letting out of the lands to the defendant."⁷ This again depends

¹ Act X of 1859, S. 10=Act VIII of 1869 B.C. S. 11.

² *Gesatoollah v. Jogodindra*.—22 W. R. 12.

³ *Budhua v. Jogeshar*.—24 W. R. 4.

⁴ Act VIII of 1885, S. 74.

⁵ *Radha v. Bal*.—17 Cal. 526 F. B.

⁶ *Padmanand v. Baij*.—15 Cal. 528.

⁷ *Jotindra v. Chandra*.—6 C. W. N. 527; *Kalanand v. Eastern*—18 C. L. J. 83.

upon the construction of the *contract* before the Court. If upon a fair interpretation of the terms of the contract the sum claimed be deemed part of the actual rent, the tenant is bound to pay it; if on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void.¹

Provision has also been made for penalty for exactions by landlords of any sum in excess of the rent payable save under any special enactments "for the time being in force" *abwab*.² *e.g.*, the Bengal Survey Act (V of 1875) S. 38, the Bengal Cess Act (IX of 1880) S. 47, the Bengal Embankment Act (II of 1882) S. 74. The *raiyat* may institute a suit to recover from the landlord, in addition to the amount or value of what is so exacted, such sum by way of penalty (not exceeding Rs. 200) as the Court thinks fit or double the amount or value thereof when it exceeds that sum.²

(vii) *Suspension of Rent.*

A tenant is entitled to a *suspension of his rent* if he is *dispossessed* from his holding by the landlord or a third party through his procurement. What constitutes *dispossession*, or, what in English law is called '*eviction*,' is clearly stated by an English Judge thus:—"I think it may now be taken to mean this—not a mere *trespass* and nothing more, but something of a grave and permanent character done by the landlord with the intention of *depriving the tenant of the enjoyment of the demised premises*."³ If the landlord enters as a mere *trespasser* and the tenant is not evicted there will be no suspension of rent. But where the act of the landlord is not a mere trespass but something of grave character, *interfering substantially with the enjoyment by the tenant of the demised property*, there is a suspension of rent, during such interference, though there may not be an *actual eviction*.⁴ Thus where the landlord forcibly compelled the under-tenant to attorn or pay rent to him, but, as a matter of fact, the *tenant was not dispossessed or disturbed*, such wrongful act on his part was not sufficient in law to constitute *ouster* of the tenant, and did not destroy the relationship of the landlord and tenant between the parties so as to

Penalty for imposition of *abwab*.

Suspension of rent.

Dispossession by landlord. What it means.

¹ *Mathura v. Tota*.—16 C. L. J. 296: also *Upendra v. Meheraj*—21 C. W. N. 108 where other cases are cited and discussed.

² Act VIII of 1885, S. 75.

³ *Upton v. Town End*—17 C. B. 30 (64)

⁴ *Dhanpat v. Mahomed*—24 Cal. 296.

relieve the tenant of the liability to pay rent to his landlord.¹ But, where he gives notice to the under-tenant not to pay rent to the tenant there is a breach if the covenant for quiet enjoyment if the *under-tenant in pursuance of such notice withholds payment of rent*. In such a case the tenant is entitled to be exempted from payment of rent. If however the under-tenant does not comply with such notice the tenant cannot claim any such exemption.²

Complete
eviction if
necessary.

Apportion-
ment or
suspension
of rent.

It should be noted that the law does not require that there should be a *complete* eviction of the lessee in order that he may be exempted from liability to pay rent. If the landlord dispossesses a tenant of a *part* of the land leased to him, there should be *no apportionment* (under S. 52 B. T. Act) *but a total suspension of rent*, for the reason is that the whole rent is equally chargeable upon every part of the land demised.³ And the rule as to the suspension of rent as a punishment for dispossession by the landlord of the tenant from a portion of the land demised, ought not to be rendered nugatory by giving to the landlord a decree for the rent *of the land still in possession of the tenant*.⁴ But if the dispossession or interference is in respect only of certain *portion* of the property the rent of which is *separately assessed*, there should be apportionment.⁵ Where, however, the lease reserves *rent at a certain rate per bigha* it cannot be said that each *bigha* is separately charged with rent, and therefore a landlord is not entitled to recover rent for the lands in the possession of the tenant, when he has dispossessed the tenant from other lands of the tenure.⁶ Where the tenant who had *not been put in actual possession* of a portion of the demised land, nevertheless *went on paying the full rent* agreed to in the lease, in a suit for recovery of the arrears of rent by the landlord. *Held* that the tenant cannot under the circumstances claim suspension of rent but that the rent payable to the landlord was liable to abatement.⁷

A tenant's right to suspension of entire rent for eviction from a substantial portion of land continues

¹ *Chander v. Jagat*—22 W. R. 337 (338); *Moni v. Kalachand*—9 C. W. N. 871 (Per Maclean C. J.).

² *Edge v. Boileau*—16 Q. B. D. 117.

³ *Dhanapat v. Mahamed*—24 Cal. 296.

⁴ *Asutosh v. Joy*—17 C. L. J. 50=8 Ind. Cas. 620.

⁵ *Dhanapat v. Mahomed*—24 Cal. 296; *Lalita v. Surnomoyee*—5 C. W. N. 353; *Raicharan v. Administrator*—9 C. L. J. 578; *Ohandra v. Ramnath*—11 C. L. J. 591; *Asutosh v. Joy*—17 C. L. J. 90; *Godai v. Asimuddin*—18 C. L. J. 509=21 Ind. Cas. 957.

⁶ *Harrow v. Purna*—28 Cal. 188.

⁷ *Romesh v. Golam*—19 C. W. N. 867; *Annada v. Mathura*—13 C. W. N. 702=9. C. L. J. 585.

till effective steps are taken by the landlord to restore him to possession¹.

The landlord no doubt is bound to protect his tenant against eviction by *title paramount*². If the land demised is evicted from the tenant or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction, and if he is evicted from *part*, the rent is to be diminished *in proportion* to the land evicted³. But eviction by title paramount would be a good defence to a suit for rent if the party evicting *having a good title*, the tenant quitted *against his will*. It is not necessary that there should be *forcible expulsion* of the tenant and the same result will follow where the party seeking to evict should claim the rent and the tenant *on such notice attorn to him* because he is not entitled to resist the claim. This doctrine of *quasi* eviction of the English law should apply in this country. But it does not apply to a case where the tenant is induced to attorn to the superior landlord by an *offer to accept a reduced rent*⁴.

• The landlord is not bound to protect his tenant from the wrongful act of *third parties*⁵. When the dispossession takes place by act of a third party, the zemindar having no concern in the matter, liability to payment does not cease⁶; but when the zemindar is not merely a party *assisting in the dispossession* but actually gave the lease under colour of which the tenant was dispossessed, the zemindar is precluded from suing the tenant for rent on account of the period of time while he is out of possession. In such a case it makes no difference whether the defendants had recovered a decree for possession and mesne profits for the period of dispossession, inasmuch as the position of a man left in peaceful occupation of his land, and the position of a man ejected and subsequently recovering a decree for possession and mesne profits, are not the same⁷.

(viii) *Payment of rent—Its time and place.*

It is ordinarily the duty of the raiyat to tender payment of rent at the *malikutchery* or the village office of the landlord.⁸

¹ *Purna v. Rasik*—13 C. L. J. 119.

² *Brojo v. Hira*—10 W. R. 120.

³ *Gopanand v. Lalla*—12 W. R. 109.

⁴ *Godai v. Aminuddi*—18 C. L. J. 509. *Noorijan v. Bimala*—18 C. W. N. 552.

⁵ *Donzelle v. Girdharee*—23 W. R. 121. *Gobinda v. Krishna*—14 W. R. 273.

⁶ *Kali v. Mathura*—34 Cal. 191.

⁷ *Kadambini v. Kashinath*—13 W. R. 338.

⁸ Act VIII of 1885, S. F4.

Where the landlord has no village office and has not appointed a convenient place for payment and there is no controlling agreement the tenant must seek out his landlord, go to him and pay the rent as it falls due.¹

Instalments.

Rent is usually payable *in instalments*, which are regulated by agreement or established usage.² A contract between a landlord and a tenant for payment of rent in *monthly kists* or instalments is valid.³ An agreement as to instalments need not be evidenced in writing. Where no agreement is proved or provable, established usage in the *Pargana* or the local area in which the holding lies, and not the practice of payment by the raiyat for a long series of years, determines the instalments.⁴ In the absence of any agreement or established usage, the rent is payable in *four equal instalments* with reference to the agricultural year.⁵ With the object of preventing the raiyats from being harassed by successive suits for arrears of rent, when by agreement or custom a larger number of instalments than four may be established, it is provided that a landlord cannot sue a raiyat for arrears of rent more frequently than once in every three months from the date of the previous suit.⁶ Under the former Acts, rent, in the absence of any contract or established usage to the contrary, was payable *annually* at the end of the agricultural year.⁷

Arrear of rent.

Rent becomes due at the last moment of the time allowed to the tenant for payment which is the sun-set of the day on which an instalment falls due.⁸ If no payment is made at or before the time, the amount payable becomes an *arrear* of rent,⁹ which then carries *interest*. The rate of interest is, under the B. T. Act, now twelve and a half per cent. per annum¹⁰ and no contract for payment of a higher rate is valid.¹¹ A stipulation for payment of interest on *each monthly instalment* (in cases where rent is payable monthly) from the time it falls due, being in excess of that which is permitted under the law,

Interest thereon.

¹ *Fakir v Bonnerjee*—4 C. W. N. 324

² Act VIII of 1885, S. 53.

³ *Manohar v. Pareesh*—18 C. L. J. 175=17 C. W. N. 820.

⁴ *Hira v. Mathura*—15 Cal. 714 *fd.* in *Watson v. Srikrishna*—21 Cal. 132.

⁵ Act VIII of 1885, S. 53.

⁶ *Ibid.*, S. 147. Selection from Papers relating to B. T. Act, 385.

⁷ Act X of 1859, S. 20=Act VIII of 1869, B. O. S. 21.

⁸ Act VIII of 1885, S. 53, 54. (1).

⁹ *Ibid.* S. 54. (3).

¹⁰ *Ibid.* S. 67 as amended by Act I of 1907 B. C.

¹¹ *Ibid.*, S. 178 (3)(h).

(12½ p. c.) is illegal and cannot be enforced.¹ Formerly it was discretionary with the court in any case to allow interest or not.² The B. T. Act has taken away the discretion and the interest is *always* leviable³ and is payable from the expiry of each quarter of the agricultural year in which the instalment falls due⁴ to the date of payment.

Where a tenant executes a *Kabuliat* containing a stipulation for payment of interest which, the landlord has assured him, will not be enforced, the *Kabuliat* is not the real agreement between the parties and the tenant is not liable to pay the interest claimed on the basis thereof, in as much as there has been an agreement that this particular clause in the deed would not be enforced and that therefore the relative position of the parties is the same as if the clause was deleted from the document. The test is, whether the tenant can maintain a suit for rescission, cancellation or variation of the contract; if he can, he may successfully resist the claim on the basis of the contracts.⁵

The court may, in substitution of interest, award *damages* not exceeding 25 per cent. on the amount of the principal rent due. But there can be no decree for both.⁶ These rules do not apply where produce-rent is payable.⁷

(ix) Realisation of arrears of rent.

Under the old law under-tenures which were *transferable* were saleable, in execution of a decree for arrears of rent due in respect thereof.⁸ The High Court ruled that this provision of the law applied to tenures which were transferable, a landlord who had a decree for arrears of rent against a raiyat with a transferable *jote*, could not eject him but could only sell the holding.⁹ The occupancy raiyats were therefore liable to ejectment for arrears of rent.¹⁰

The B. T. Act has effected a radical change in the position of the occupancy raiyats in this respect. In the first place it protects them against ejectment for arrears of

¹ *Monohar v. Paresh*—18 C. L. J. 175=17 C. W. N. 120.

² *Kashee v. Mainuddin*—I. W. R. 154; *Radhika v. Urjoon*—20 W. R. 128; *Brekwith v. Kisto*—Marsh, 278.

³ *Fakir v. Bonnerjee*—4 C. W. N. 324.

⁴ Act VIII of 1885, S. 67.

⁵ *Nadia v. Birendra*—20 C. W. N. 1067.

⁶ Act VIII of 1885 S. 68.

⁷ *Rampini's Bengal Tenancy Act*, 4th Edition, 196, 233.

⁸ Act VIII of 1869 B. C. S. 59.

⁹ *Kristendra v. Aina*—8 Cal. 675=10 C.L.R. 399; *Fakir v. Fauzdar*—10 Cal. 547.

¹⁰ Act X of 1859 S. 21 and 22=Act VIII B.C. of 1869 S. 23.

Liability of holding to sale.

Rent first charge on holding.

rent. They cannot now be ejected merely on the ground of arrears of rent.¹ They can be ejected for other grounds specified, of which non-payment of rent in due time is not one,² and they can not contract themselves out of this provision of the law.³ In the second place it declares that their *holdings* (even though non-transferable) are liable to be *sold in execution of decrees of arrears of rent* due in respect thereof and that the *rent shall be the first charge thereon*—in other words, the holdings shall be regarded as *hypothecated for such arrears*. And when a holding is sold otherwise than in execution of a decree for arrears of rent (*e.g.* a mortgage decree) it is sold *subject to the lien of the landlord* on it for any rent due at the time of sale. In other words, the purchaser takes it *subject to the charge for the rent* which has accrued due at the time of its purchase, in the sense at least that he is bound to pay it, if the landlord proceeds to execute his decree by bringing it to sale.⁴ The landlord is thus in the position of a *first mortgagee* so far as rent is concerned.⁵

Relative position of purchasers at rent and other execution sales.

Rent under B. T. Act is a first charge on the holding. The landlord's charge on the land for rent is prior to the charge created by the tenant in favour of the mortgagee. So the purchaser at a rent sale has priority over the purchaser at a sale in execution of a mortgage decree⁶. But a mortgage is an *incumbrance* within the meaning of S. 161 B. T. Act and is liable to be and must be *annulled by the purchaser* at a sale in execution of a decree for arrears of rent. The mortgage security is not extinguished till the sale has taken place in execution of the mortgage decree and the proceeds have been distributed in satisfaction of the sum due to the mortgagee. The interest of the mortgagee therefore continues as an *incumbrance* even *after he obtains the decree*, and must be annulled by the purchaser at the sale for arrears of rent⁷, otherwise he would be liable to satisfy the mortgage. If the mortgagee purchases the property in execution of his own decree, his interest would be equally an *incumbrance* which must be annulled by the auction-purchaser, even though

Sale free from incumbrance.

¹ Act VIII of 1885, S. 65.

² *Ibid*, S. 25.

³ *Samanta v. Ananta*—4 C. L. J. 521.

⁴ *Tarini v. Narayan*—17 Cal. 301.

⁵ *Maharane v. Harendra*—1 C. W. N. 458.

⁶ *Gopinath v. Kashi*—9 C. L. J. 234=13 C. W. N. 412; *Taibattanesea v. Prarabuti*—10 C. L. J. 640.

⁷ *Jagnarain v. Badri*—16 C. L. J. 156.

he is the landlord himself.¹ In either case, the auction-purchaser loses his priority and remains subject to the right of incumbrancer.² When a landlord makes the purchase of a holding in execution of his rent decree, he may be taken to have become absolutely entitled to the property, and it follows from S. 100 T. P. Act, that the *landlord's charge for rent* which is for his benefit, *continues to subsist after his purchase*. So where an occupancy holding was mortgaged and the mortgage was *not annulled* by the landlord after his purchase. *Held* that in a suit by the mortgagee the decree in favour of the mortgagee should be subject to the first charge for rent in favour of the landlord, and the mortgagee is entitled to enforce the mortgage on payment of the money due under the rent decree, his position being that of a *second mortgagee*.³

Under the old law the remedy of the landlord for the enforcement of his decree for arrears of rent was confined, in the first instance, to the *holding itself* in case it was saleable and he was debarred from proceeding in execution against *any other immovable* property of the tenant until he could shew that his decree could not be satisfied by attaching the person and moveable property of the judgment-debtor. He could not however proceed against his person and property *simultaneously*⁴. But these restrictions have now all been removed.

Liability of holding to sale.

Under old law.

Under the present law the landlord's position is that he has a *mortgage or charge on the holding* for rent⁵ which can be enforced *by its sale*, and, if in any case the decree for rent either has not been or cannot be enforced by the sale, it cannot be enforced in any other way. Thus the landlord is *estopped* from proceeding against the defaulting holding, after it had passed into other hands by his own acts, as where he chose to put up to sale a *raiya* holding and purchased it himself in execution of a money decree and afterwards settled it with other *raiya*s, he could not again proceed against it for arrears of rent due for past years from the original *raiya* so as to give any title to the purchaser

Under B. T. Act.

When it can't be sold

¹ *Banbeharl v. Khetra*—38 Cal. 923.

² *Gocool v. Debendra*—10 C. L. J. 136.

³ *Meherunnessa v. Sham*—6 C. W. N. 834.

⁴ *Denatulla v. Nazur*—10 W. R. 341: *Joki v. Nursingh*—4 W. R.

(Act X) 5: *Harish v. Collector*—3 Cal. 712.

⁵ Act VIII of 1885, S. 65.

⁶ *Sashi v. Gagan*—22 Cal. 364.

Rent for
prior period.

at a sale in execution of a decree for such arrears.¹ Similarly where the holding is sold in execution of a decree for its own arrears it passes to the purchaser "free from incumbrances" and therefore free from all liability for previous arrears² and therefore cannot be resold for recovery of such arrears. But though the purchaser at the second sale acquires no title to the holding, he is entitled to recover from the landlord the purchase money.³ Where, however, the holding is sold in execution of a decree for rent with *notice that it is saddled with liability* for arrears of rent for a period anterior to the date of sale, the purchaser liable for the rent of such period.⁴ When a landlord has himself taken a mortgage of the holding, he is debarred under S. 99, Transfer of Property Act, from bringing it to sale in execution of a decree obtained for arrears of rent due in respect thereof otherwise than by instituting a suit under S. 67 of that Act.⁵ But the new C. P. C. Or 34 r 14 has altered the law in this respect.

Personal
liability of
tenant.

The landlord has also a remedy *against the raiyat personally* for the debt due to him. That being the case, he has a right to avail himself of either of his remedies, and is *not bound to proceed against the holding* in respect of which the arrears have accrued, and for which he has obtained the decree in the first instance, but is entitled to pursue his other remedies before he sells the holding itself⁶. The provisions of S. 68 of the Transfer of Property Act are not made applicable by S. 100 of that Act to a person having a 'charge' within the meaning of the latter section; and the 'charge' referred to in Section S. 65 B. T. Act is not such a charge as that defined by S. 100 of the same.⁷ All the authorities in our courts have laid down that it is not competent to a court to direct in what manner the landlord shall execute his decree for rent and that he cannot be compelled to proceed first against the holding and then against the person of the tenant.⁸ Under the head of *moveable property*, which a landlord is at liberty to proceed against in execution of a decree for

Landlord
not bound
to proceed
against
holding first.

¹ *Ram v. Mahammed*—3 C. W. N. 62.

² *Faiz v. Ram*—21 Cal. 169. See also *Haradhan v. Kartic*—6 C. W. N. 877; *Mathura v. Nabin*—24 C. L. J. 34.

³ See 1 above and 14 C. W. N. 1096.

⁴ *Haradhan v. Kartic*—6 C. W. N. 877.

⁵ *Rai v. Surendra*—1 C. W. N. 80. *Seodeni v. Ram*—26 Cal. 164. But see *Khiarajmal v. Dain*—32 Cal. 926.

⁶ *Tarini v. Narain*—17 Cal. 301. *Bhabani v. Protap*—8 C. W. N. 575.

⁷ *Fatik v. Folley*—15 Cal. 492.

⁸ *Kerho v. Lalji*—1 P. L. J. 138.

arrears of rent, apparently the raiyat's implements of husbandry and such cattle as may, in the opinion of the court, be necessary to enable him to earn his livelihood as such, are exempt from attachment and sale in execution of a rent decree, but the materials of his houses and other buildings occupied by him, though exempt from attachment or sale in execution of other decrees are yet liable to be attached and sold in *execution* of decrees for arrears of rent.¹ Under this head also comes his tenant's right to recover rent under a decree from an under-tenant.²

There was ample justification for the proposition that where the holding of an occupancy raiyat was sold and he was evicted from it for non-payment of rent under Act X of 1859, the interest of an under-raiyat was not void but voidable. But there was no case of an under-raiyat's status being recognised where the occupancy holding was entirely destroyed under the Old Rent Law. S. 82 of the Act X seemed to completely decide the question by its direction that when a decree was for eviction of a raiyat, the decree-holder should be put in actual physical possession of the land and it seemed impossible to say that the decree-holder could be put into actual physical possession of the land, unless indeed it be conceded that the under-raiyat was completely ignored and treated as having no *locus standi*.³ Under the B. T. Act a *sub-lease* is an "incumbrance" which a purchaser at a sale held in execution of decree for arrears of rent, is entitled to annul provided the sub-lease is valid against the landlord under S. 85 B. T. Act. The matter will be discussed hereafter.

According to the terms of S. 65 B. T. Act rent due to a fractional *co-sharer* landlord would seem to be as much a charge on the holding on which it has accrued as the rent due to the *whole body* of landlords.⁴ But the High Court has pointed out that a decree contemplated by S. 65 B. T. Act is a decree made in a suit in which *all the landlords co-sharers are plaintiffs* and not merely some of them, *i.e.*, fractional co-sharers⁵ or, in other words, a decree obtained by all the landlords, or, at all events, a decree obtained by some of the landlords for the entire rent in the presence of all.⁶ In any case S. 188 B. T. Act apparently prevents

¹ C. P. C. '82, S. 266 (b)—(c)=C. P. C. '08, S. 60 (b)—(c).

² *Mahesh v. Garu*—13 W. R. 407.

³ *Bishen v. Chandra*—36 Ind. Cas. 658 (Pat).

⁴ *Rampini's B. T. Act*, 4th Ed. 228.

⁵ *Narain v. Srimanta*—29 Cal. 219.

⁶ *Sarbo v. Wilson*—32 Cal. 680.

a co-sharer landlord from enforcing his rights under this section¹. It may, therefore, be stated that the B. T. Act does not contemplate or provide for the sale of a holding at the instance of one or some only of the several joint landlords who have obtained a decree for the *share* of the rent *separately* due to them. Such a sale must be held under the provisions of the Civil Procedure Code and would not carry with it the special incidents attaching to a sale under the Act.² A fractional co-sharer who has obtained a decree for his share of the rent cannot, therefore, *sell* the holding but only the *right, title, and interest of his judgment-debtor* in it in execution of his decree³. A fractional share-holder selling a non-transferable occupancy holding in execution of a decree which he obtained for his share of the rent is, therefore, in *no better position than an outsider* selling the holding in execution of a money decree⁴. When, therefore, an occupancy holding not transferable by custom or local usage, is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by his purchase, the judgment-debtor having no saleable interest in the holding⁵. And the raiyat is entitled to object to the sale in execution of the decree before it is held and also to the application for delivery of possession even after the confirmation of the sale on the ground that it was illegal provided he had no knowledge of the execution proceedings.⁶

Change in
Law

Decrees for arrears of rent obtained by single co-sharers were therefore of little value under B. T. Act of 1885 and the law further exposed the tenant to the trouble of several successive suits brought by different co-sharer landlords. And, as it is often impossible to get all the landlords to join in a suit for arrears of rent, the law on this point has been altered. A single co-sharer has now been empowered to sue for the rent due to all the co-sharers and the holding will pass in execution of a decree obtained by him provided that the other co-sharers have been made parties to such a suit.⁷

¹ *Beni v. Jaod*—17 Cal. 390.

² *Saudagar v. Krishna*—26 Cal. 937=3 C. W. N. 742.

³ *Hari v. Ranjit*—1 C. W. N. 521=25 Cal. 917.

⁴ *Jarip v. Ram*—3 C. W. N. 747. *Afraz v. Kalsamannessa*—10 C. W. N. 170=4 C. L. J. 68.

⁵ *Saudagar v. Krishna*—26 Cal. 937=3 C. W. N. 742.

⁶ *Dayamayis Case*—20 C. L. J. 52 F. B.=18 C. W. N. 971 F. B. as explained in *Badarmurra v. Alam*—21 C. L. J. 650 also *Narayani v. Nabin*—25 C. L. J. 851.

⁷ S. 148A & S. 158B introduced into B. T. Act, 1885 by Act I of 1907 B. C

A decree for the *consolidated rent of several holdings* cannot be executed by the sale of the holdings. This would be making each of the holdings liable for the rent of the others.¹ But a decree in one suit for rent in respect of several tenancies, *specifying the sum due on each tenancy* has the same effect as if the plaintiff has obtained several different decrees against the same tenant in respect of each tenancy in several distinct suits.²

Decree for consolidated rent of several holdings.

The right exists so long as the relationship of landlord and tenant exists. In order therefore to acquire the right not only the person obtaining the decree must be the landlord but the person seeking to execute the decree by the sale of the holding must have the landlord's interest vested in hand.³ But it does not matter that he has lost that interest before the actual sale.⁴

Execution of rent when landlord has no interest.

(r) *Produce rent.—Its appraisalment and commutation.*

The rent of an occupancy raiyat may be paid either *in money or in kind*. The system of paying rent in kind or on the estimated value of a portion of crops prevails chiefly in the southern districts of Behar (e.g. Gaya, Shahabad and Patna), but is not confined to those districts. There the character of the country renders necessary the maintenance of an elaborate village system of irrigation (*gilandazi*) for which the co-operation of all the villagers and the landlord is required. The practical difficulties in the way of the maintenance of the system of irrigation by the raiyats themselves, which would necessitate combination among the residents of each village, or several villages where a water-channel serves more than one village, have undoubtedly established among the tenants a preference for the system. Under it the rental varies with the out-turn of the crops, and the tenants are at least secured half their produce; while the landlord, on whom the duty of maintaining the irrigation works devolves, is under a strong inducement in his own interests to keep

Produce rent where prevalent and why

¹ *Mahendra v. Ram*—10 C. W. N. ccliii; *Hridai v. Krishna*—11 C. W. N. 497=34 Cal. 298; *Baikunt v. Thakur*—11 C. W. N. 676. *Nanda v. Sadhu*—7 C. L. J. 96; *Bipra v. Raja* 13 C. W. N. 650. *Mulluk v. Satish*—11 C. L. J. 56=14 C. W. N. 335; *Rash v. Debendra*—16 C. W. N. 395. *Kanta v. Lachman*—16 C. L. J. 197.

² *Dhirendra v. Nischintapara Co.*—36 Ind. Cas. 328=26 C. L. J. 118.

³ *Forbes v. Bahadur*—41 Cal. 926=18 C. W. N. 747=25 C. L. J. 434. *P. C. reversing Bahadur v. Forbes*—7 C. L. J. 652; *Khetra v. Kritarthamayji*—33 Cal. 566 F. B.=10 C. W. N. 547; *Profulla v. Nosibannessa*—24 C. L. J. 331.

⁴ *Syedunnessa v. Anuruddi*—25 C. L. J. 629 in which Moorerjee J. as made a review of the previous rulings.

them in fair order. But under a money rent system his interest in them would, to a great extent, cease. Under the circumstances, in Behar the holding of land on produce rent, known as the *Bhaoli* system is a regular form of the tenancy, very common in the three districts named above lying south of the Ganges¹.

Two methods

There are two broadly-different prevailing methods by which the produce rents are collected. Under the one (*Agarabatta*) the crop is divided and the landlord's share, which is generally one-half, is made over to him in kind; under the other (*Bhaoli* or *Danabadi*) the value of the crop is appraised and the price of the landlord's share is paid in money.

Their evils.

The system was reported to be attended in Behar by grave abuses which S. 69 to 71 B. T. Act are intended to remedy² and was supposed to be economically bad and oppressive, and facilities are therefore afforded by the B. T. Act for *commuting rents payable in kind into money rents* on the application of the tenant or the landlord.³

Commutation

Either the raiyat or the landlord may apply for the purpose⁴ to a particular officer—Collector, Sub-divisional officer, Settlement officer, or assistant to him, or an officer specially authorised in this behalf by Government,⁵ who shall determine the sum to be paid as money rent.⁶

Circumstances to be considered.

In doing so, he shall have regard to :—(a) the average money rent payable for similar lands in the vicinity; (b) the average value of the rent actually received by the landlord during ten years or shorter period for which evidence may be available; (c) the charges incurred by the landlord in respect of irrigation and required for continuing the same; (d) the improvement of the holding made by either parties⁷. According to the instructions issued by the Board of Revenue, in determining the amount of the money-rent, the officer must be careful to take into consideration, not one only, but all the matters mentioned save (c) whenever it has no application. A money-rent fixed on the basis of (a) only would ordinarily be *too low*, while one fixed on the basis of (b) only would ordinarily be *too excessive*. Apart from any

¹ Board of Revenue's Report on the working of B. T. Act No. 419A, dated 30th April, 1892, para. 21.

² Finucane and Amir Ali's B. T. Act, 2nd Ed., 334.

³ *Ibid*, 218.

⁴ Act VIII of 1885, S. 40 (c).

⁵ *Ibid* (2).

⁶ Act VIII of 1885, S. 40(3).

⁷ *Ibid*, (4) as amended.

consideration due to (c) the officer is required to "have regard" to both (a) and (b), and to fix a rent which will be fair in comparison with both the average cash-rent of the neighbourhood and the rent in kind hitherto realised for the land. Unless the landlord has undertaken to maintain the means of irrigation in which case (c) would apply, it must be borne in mind that, as the rent ceases to vary with the out-turn and becomes fixed, the risk of the season falls on the tenant alone, and the rent should therefore be such as, taking the seasons (good and bad) one with another, he will be capable of meeting, and may, therefore, be reasonably imposed on him.¹

The time from which the commutation is to take effect should be stated in the order.² This is *imperative*. The object is to enable the parties to know from what date the new arrangement is to come into operation. It ought not to be left in uncertainty; and in the absence of any date being fixed in the order, the order must be taken to be practically *inoperative*, at any rate to remain in suspense until it is amended by the specification of the term of its operation.³

Time of operation of order.

The rent so commuted is to remain *unaltered for 15 years*. During the period it cannot be enhanced or reduced. But this rule does not apply where the holding is *improved* by the landlord or there is alteration of its area or its *deterioration* during the period, whether permanent or temporary, without the raiyat's fault.⁴

The rent may also be commuted *by agreement* of the parties themselves and where there has been a formal commutation of *Bhaoli* into *Nukdi*, one of the contracting parties cannot, without the consent of the other, insist on reverting to *Bhaoli*.⁵ But where the *occasional deviations* to *Nukdi* were not intended to be permanent, the landlord can claim *Bhaoli*. The question in each case is what is the *intention of the parties*; if the parties intended that the substituted agreement was to last for a specified period or during the continuance of specified circumstances, or that either party could resile from the substituted agreement, with or without notice, either party may claim to revert to the original agreement; if, on the other hand, no such intention is proved, the substituted agreement can be annulled, only

Commutation by agreement

Variation thereof.

Permanent or temporary.

¹ Instructions issued by Board of Revenue under S. 40.

² Act VIII of 1885, S. 40(5).

³ *Raghunath v. Dhoda*.—18 Cal. 467.

⁴ Act VIII of 1885, S. 40A, added by Act I of 1907 B.C.

⁵ *Dursan v. Fasihun*.—6 C. L. J. 369.

by consent, by both parties.¹ Thus the payment of rent in money may be, as stated before, in consequence of a variation of the original stipulation or merely *as a matter of indulgence or for purposes of convenience*. And in the latter case the landlord is not debarred from demanding payment in kind in conformity with the original contract by the mere fact that the raiyat had paid the rent in money which had been accepted by the landlord for a number of years. The question whether the payment of rent in money is due to the one or the other cause is a pure question of fact, and must depend upon the special circumstances of each case; and the fact that the rent was so paid for some years may be an element for consideration.²

Rent in cash
or kind.

Disputes often arise as to whether the rent payable by the raiyat is payable *in cash or in kind*. The question really depends upon the construction of the lease, in each particular case. Where, under the document, the tenant agreed to pay to the landlord produce-rent of a certain amount, and on his failure to do so to pay its price and the document, only merely for the convenience of the parties or for purposes of registration and stamp, goes on to state the value of the produce-rent as existing at the time when the document was executed, the estimate of the value was not intended to modify, in any way, the terms of the contract between the parties, which was that the tenant should pay a yearly rent in kind and that, on his failure to do so, he should pay its price. Thus, where the lease stated that paddy to be delivered and if the tenant failed to do so according to the instalment stated, then the *arrears of the rent in paddy or the price thereof* shall be realisable by legal process and in the tabular statement at the bottom of the lease is entered "*—aris of paddy, value—Rupees.*" *Held* that what was contemplated was payment of the rent by delivery of the paddy itself, and, in case of failure, the tenant was to pay the market-value of the paddy.³ Where on the other hand, a rental of Rs. 35 having been fixed on condition of making over in lieu of the said amount of rent, a quantity of rice per annum in accordance with the standard seer. *Held* that the landlord was entitled to rent paid in money and not in kind.⁴

¹ *Kashi v. Iswari*.—6 C. L. J. 727.

² *Sobhat v. Abdool*.—3 C. W. N. 151.

145. *Parthasarathi v. Sivendra*.—14 C. W. N. 938 P. C.

³ *Adhar v. Kirtibash*.—12 C. L. J. 589. *Bipro v. Suchand*.—12 C. L. J. 595=14 C. W. N. ccxxxii.

⁴ *Bipro v. Suchand*.—12 C. L. J. 595=14 C. W. N. ccxxxii.

In most, if not all, other districts of the province Where no
lands are also found, the produce of which is divided between tenancy.
the cultivators and the landlord. The settlement with a
person by which he undertakes to cultivate the land for a
share of the produce, the remaining share going to the owner,
does not, by itself, create the relationship of landlord
and tenant between the parties. Local custom recognises
in such cases no right to the land in the cultivator, but
merely to a share of the produce raised by him.¹ In such
cases the cultivator is a mere *servant*, or *labourer* and is not
raiyat. But the cultivator may be a tenant. Such is the
position of a *Bhagidar*, *Adhidar* or *Adhiyar* and *Burgadar*.
The matter has already been sufficiently discussed.

¹ Board of Revenue's Report on the working of B. T. Act,
No. 419A, dated 30th April, 1892, para. 21. But see *Secretary v.*
Govinda—21 C. W. N. 505.

§ 2—PROTECTION FROM EJECTMENT.

Ejectment.

Immunity from ejectment by the landlord, except under very peculiar circumstances, is the greatest boon conferred on occupancy raiyats by the Rent Acts of 1859, and 1869 and the B. T. Act.¹ The principle on which it is based is that by the ancient customary law of the country, a *khul kasht* raiyat was entitled to hold his land as long as he paid the rent for it. Now an occupancy raiyat has a substantial interest in his holding, such that he cannot be deprived of it except under the provisions of the law relating thereto. The interest possessed by him was created by the common law and custom of the country, and not by any act or contract with the landlord, and cannot arbitrarily be taken away by the latter. He can be divested of it only for the special reasons prescribed by the law.²

(i) Non-payment of rent ground under old law.

Act X of 1859 put an end to the landlord's right to eject occupancy raiyat except for *non-payment of rent*, or for breach of any condition in the contract, or for mis-use of the land. Ejectment could be enforced under a decree of Court.³ On *non-payment of rent*, the landlord had the right to get a decree for ejectment on default of payment of the amount of the decree within fifteen days from the date of the decree. But if the tenure was *transferable* by custom or local usage, the landlord could not get a decree for ejectment; he could only put up to sale the tenant's interest; and even if the lease stipulated for immediate ejectment for non-payment of arrears, the Court might extend the period of fifteen days on reasonable grounds.⁴

But not under B.T. Act.

The B. T. Act has, however, taken away from the landlord this right to eject a raiyat for non-payment of rent. Whether the occupancy right is transferable by custom or not, the tenant is not liable to ejectment for arrears of rent, but his holding is liable to be sold in execution of a decree for the rent thereof, and the rent is declared to be a first charge thereon.⁵ The landlord has now the right of selling the land as property belonging to the raiyat, or, if he does not choose to do so, he can follow,

¹ Saroda Mitra's *Land Law of Bengal*, 302.

² Finucane and Amir Ali's B. T. Act, 1st Ed., 145.

³ Saroda Mitra's *Land Law of Bengal*, 303.

⁴ Saroda Mitra's *Land Law of Bengal*, 303.

⁵ Act VIII of 1885, S. 65.

in execution of his decree, any other property of the raiyat, whether moveable or immovable, but he cannot eject him from his holding.¹

As regards the *breach of condition* in the contract it is necessary to bear in mind the fundamental distinction between two classes of cases which has been recognised by a long line of decisions, namely, cases where there is a covenant in the lease against certain acts, but *no right of re-entry reserved* in the landlord; and cases where there is a covenant in the lease against the same coupled with a *clause for re-entry*. In the first class of cases, the *lease is not forfeited* by breach of covenant; and the remedy of the landlord is either by way of *injunction* against apprehended breach, or, by recovery of *damages* for a breach already committed. In the second class of cases, where the lease reserves a *right of re-entry*, the landlord is not limited to the reliefs by *injunction* or *damages*, but may, at his choice, *treat the lease as forfeited* and exercise his *right of re-entry*. The lease becomes not void but *voidable*, and only the lessor, and not the lessee at default, can treat the term as at an end. The election by the lessor may be made by *express words* or by *act*. When however the landlord indicates his election to take advantage of his forfeiture, the forfeiture takes effect from the *moment of breach*. The forfeiture is complete when the breach of the condition occurs. Consequently election is not a condition precedent to the right of action, but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined.²

(ii) Breach of covenant in the lease.

Where right of re-entry reserved.

Where it is not.

It is a rule of law that if there is a lessee and he has created an *underlease* or any other legal interest, if the lease is forfeited, then the underlessee or the person who claims under the lease, loses his estate as well as the lessee himself, but if the lessee surrenders, he cannot by his own voluntary act in surrendering prejudice the estate of the underlessee or the person who claims under him.³

Position of under lessee &c.

Under the former law, the landlord was entitled to enforce a *covenant in the lease by which forfeiture was expressly provided as the penalty* for the breach of any particular clause.³ And accordingly, where a lessee had covenanted not to excavate a tank on the land leased to him, on breach of

Under old law.

¹ *Lalit v. Binodai*—14 Cal. 14; *Fotick v. Foley*—15 Cal. 472. See *Ante*.

² *Dwarika v. Mathura*—24 C. L. J. 40.

³ *Birchandra v. Hussain*—17 W. R. 29. *Mahammad v. 'Shib*—16 W. R. 103.

which covenant he was liable to be evicted, besides paying the cost of filling up the tank, it was *held* that the zemindar was entitled to declare the lease cancelled and resume the whole of the lands, or to sue for *cancellation* of the lease and for damages,¹ and that there was nothing incompatible in the two remedies of damages and forfeiture for breach of the conditions of a lease.² But, although the parties were bound by the terms, which they had deliberately agreed upon between themselves³ yet, in the *absence of any provision* in the lease for its cancelment upon the breach of its conditions, or reserving to the landlord the right of re-entry on the happening of any such breach, it was *held* that such breach did not lead to the cancellation of the lease or give a right to eject.⁴

Under B.T.
Act.

Under the present law the landlord is not entitled to eject an occupancy raiyat upon the basis of a *covenant* in the lease *providing for forfeiture or re-entry* as the remedy for the breach, unless the covenant is *express*⁵ and "*consistent with the provisions of the Act.*"⁶ Even if the raiyat were to stipulate in the lease that he would be liable to be evicted on breach of any stipulation in the lease, such covenant, if inconsistent with the provision of the Act, would not be enforceable in law. The raiyat is not allowed to contract himself out of these provisions.⁷ As to whether covenant not to transfer the holding is valid and binding see *ante*.

(iii) Mis-use
of land.

An occupancy raiyat is also liable to be ejected for *mis-use of the land* "which renders it unfit for the purposes of the tenancy."⁸ What amounts to improper user so as to entail forfeiture will be dealt with hereafter.

Conditions
precedent to
ejection.

The raiyat cannot be ejected on these grounds except *in execution of a decree* passed in a suit brought for the purpose. And before the landlord can even bring such a suit, in order either to have the lands brought back into the original condition in which they were, or to get relief for the breach of the conditions of the contract, the law⁹ prescribes that the landlord should serve a *notice* on the tenant, specifying the *precise and particular misuse* of the land under clause (a), or the *breach* under clause (b);

Suit.

¹ *Birchand v. Hussain*—17 W. R. 29.

² *Chundar v. Sardar*—18 W. R. 218.

³ *Ramkumar v. Ram*—7 W. R. 132.

⁴ *Augar v. Mahini*—2 W. R. (Act X) 107.

⁵ *Mahadeo v. Panchkari*—16 C. W. N. 322 (324.)

⁶ Act VIII of 1885, S. 25 (b).

⁷ *Ibid*, S. 178 (1) (c).

⁸ Act VIII of 1885, S. 25 (a).

⁹ *Ibid* S. 155.

and, if these two acts are capable (*i. e.* physically possible)¹ of being remedied, requiring him to *remedy* the same, and in any case (*i. e.* every case,² whether it is capable of remedy or not) asking him to pay reasonable *compensation* for either of these acts under clause (a) or clause (b).² Omission to demand compensation in a notice prevents a suit for ejectment from being entertained at all.² And if the tenant fails to comply with the demand within a reasonable time, *namely*, with the requisition asking him to remedy the breach or to pay compensation, the landlord would be entitled to bring a suit, the procedure for which is also laid down.

Prior notice
to pay
compensation

Upon such a suit being brought, if the conditions precedent have been complied with, the Court has the power to make a decree declaring the amount of compensation reasonably payable to the landlord, and whether, in the opinion of the Court, the misuse or the breach is capable of being remedied, and, if so, the court is to declare and direct that the defendant should remedy the same (within a reasonable period to be fixed by the court). In such a case a decree which merely directs the payment of compensation is not a proper decree.³ In the other case, the landlord would be entitled only to compensation. If the tenant, within the period, pays the compensation and remedies the misuse or breach to the satisfaction of the court, the decree shall not be executed.

Relief against
forfeitures.

The result, therefore, is that if the tenant pays the compensation for which he has been declared liable, he cannot be *ejected*; if the misuse or the breach is capable being remedied and he does not comply with the injunction to remedy it, he is liable to be ejected, and if he fails to pay the compensation awarded, he is of course liable also to ejectment. But where he pays the compensation, or, where the act is capable of being remedied and he has remedied it, there is no ejectment.⁴

Before the landlord can succeed in an action under S. 25 B.T. Act it is obligatory on him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy or that there has been a breach of the terms of the contract.⁵

Onus

¹ *Harak v. Kirat*—10 C. L. J. 597.

² *Pershad v. Ram*—22 Cal. 77 (84—85).

³ Act VIII of 1885, S. 155.

⁴ *Afladdi v. Satish*—34 Ind. Cas. 497.

⁵ *Sourindra v. Rahim*—15 Ind. Cas. 497.

Measure of
damage,
nominal or
substantial.

The compensation, according to the terms of the section, is *for the breach*. To determine this compensation, we must contrast the position of the landlord immediately *before* the breach with that *after* the breach, and then ascertain the loss, if any, he has sustained by reason of the breach. The plain intention of the Legislature is that the compensation shall be for the injury which may have been caused to the landlord by the breach of the covenant, in other words, the measure of damages is such a sum as will place the landlord in the same position as if the breach has not taken place. It is wrong to ignore altogether, for the purpose of assessment of damages, the period *antecedent* to the breach, to confine our attention solely to the period *subsequent* to the breach, and then to contrast the position of the landlord if he is allowed a decree for ejectment with the position if such relief is with-held and to hold that the advantage the landlord thus loses is the true measure of the damages for breach of covenant by the tenant. If the landlord has not suffered *substantial* damages (*i.e.* any damage measurable in money) by reason of the breach of the covenant, justice does not demand that he should be allowed to claim from the tenant anything beyond *nominal* damages. The two classes of contingencies, namely, misuse of the land and breach of a condition are placed in the same category in so far as the assessment of reasonable compensation is concerned.¹ The claim must include the *whole* of the lands of the tenancy.² What has to be considered is the effect of the act on the *entire land* comprised in the tenancy.³

Claim in
respect of
whole
tenancy.

Compensation to
raiyyat for
improvement.

An ejected raiyyat has the right to get compensation for any *improvement* effected by him and the principles of calculating the compensation has been laid down in the Act.⁴ The Act gives him the further right in respect of crops and land prepared for sowing.⁵

The right given by S. 155 B. T. Act is given to the raiyyat *personally* and can not be claimed by an auction-purchaser of the interest of a raiyyat whose tenancy is forfeited by a breach of a condition in the lease.⁶ But it has been held in a very recent case that the section

¹ *Keshab v. Jnanendra*—20 C. L. J. 232.

² *Kamaleswari v. Hurbullubh*—2 C. L. J. 369.

³ *Sourindra v. Rohini*—15 Ind. Cas. 497.

⁴ Act VIII of 1885, S. 82—83; see also S. 178 (1) (d).

⁵ *Ibid*, S. 156.

⁶ *Dwarika v. Mathura*—24 C. L. J. 40.

appears to allow the deposit to be made not only by the original tenant but by any person who is impleaded as a defendant.¹

But the right of the landlord to object is to be *promptly* exercised; if he *stands by and allows*, the tenant to go on, he could not afterwards turn round and seek to evict the raiyat or interfere with him on that basis.² Thus where a tenant of an agricultural holding *planted his jote with mango trees* to the knowledge but without the consent of the landlord, thus changing the character of the land, and the landlord sued sometime afterwards for a mandatory injunction to have the mango trees removed, it was held that having stood by and allowed the tenant to spend his labour and capital upon the land without taking action in the matter, he was not entitled to any equitable relief in the shape of an injunction.³ So if a landlord allowed his tenant to *erect pukka buildings* on the land he could not turn him out of possession.⁴ Similarly, if he allowed him to *excavate a tank* or to excavate earth for *brick making*⁵ without making any attempt to restrain him,⁶ he would not be allowed to eject or interfere with him afterwards.

The right of the landlord to eject may also be lost by his conduct amounting to a *waiver of the forfeiture* incurred. The courts always lean against forfeitures and therefore whenever a landlord means to take advantage of any breach of covenant or condition which operates as a forfeiture of the lease, he must not do any act which may be deemed to be an acknowledgment of the continuance of the tenancy and so operate as a *waiver* of the forfeiture.⁷ The following acts have been held to amount to a *waiver* under the English law :—Demand or acceptance of rent accruing due after the forfeiture operates as a matter of law to waive all forfeitures then known to the lessor, notwithstanding any protest on his part against such waiver; but subsequent receipt of rent due prior to the forfeiture is no *waiver*. Action for

¹ *Aftiaddi v. Satish*—34 Ind. Cns. 497.

² *Beni v. Jai*—12 W. R. 495=7 B. L. R. 152; *Shib v. Baman*—15 W. R. 360=8 B. L. R. 242; *Kedar v. Khettro*—6 Cal. 34=6 C. L. R. 569; *Prasanna v. Jagan*—10 C. L. R. 25; *Nicholl v. Tarini*—23 W. R. 298; *Naina v. Rupkian*—9 Cal. 609=12 C. L. R. 300.

³ *Naina v. Rupkian*—9 Cal. 609=12 C. L. R. 300.

⁴ *Beni v. Joy*—12 W. R. 495=7 B. L. R. 159; *Sib v. Baman*—15 W. R. 360=8 B. L. R. 242; *Prasanna v. Jagan*—10 C. L. R. 25.

⁵ *Nicholl v. Tarini*—23 W. R. 298.

⁶ *Kedar v. Khettro*—6 Cal. 34=6 C. L. R. 569. *Ibid.*

⁷ *Woodfall's Landlord and Tenant*, 17th Ed, 30.

rent accruing due after the forfeiture, or distress for rent also amounts to *waiver*.¹ Similarly, it has been decided in India that a landlord who has accepted rent from his tenant subsequently to the date of forfeiture must be held to have waived his right to eject.² If he sues his tenant for rent due subsequently to the date of the forfeiture, he will similarly lose his right to eject.³ But he can sue for ejectment on further breaches of the condition of the lease.⁴ Receipt of rent is not in itself a waiver of every previous forfeiture: it is only evidence of a waiver.⁵

There can be no *waiver* unless the landlord has full knowledge of his rights and of the facts which would enable him to take effectual action for enforcement of such rights. The burden of proof is on the tenant who relies on the waiver.⁶

Limitation.

The B. T. Act provides one year's limitation for a suit to eject a *raiya* on account of a breach of condition in respect of which there is a contract *expressly* providing that ejectment shall be the penalty of such breach; that is to say, for a suit under S. 25 (b) of the Act.⁷ But where there is no written contract the authors of the Act have possibly considered that the general law which provides two years' limitation (under Article 32 Schedule I of the Limitation Act) sufficiently dealt with that case. If it were otherwise, there would be an extraordinary difference between the periods provided in the one case for a suit where there was a written contract and in the other for a suit of a similar nature where there was no written contract. Moreover apart from the words of the section, it is obvious that in a case of this kind one would expect to find legislature fixing a comparatively short period of limitation, as great hardship might be done to a tenant if his landlord were to stand by and take no steps until close upon the expiration of a long period of limitation. The Act also contains no provision regarding suits under S. 25 (a) of the Act. Such a suit is governed by the same Article of the Limitation Act. Thus a suit brought under S. 25 (a) and S. 155 B.T. Act for ejectment of a *raiya* and for the removal of trees planted by him on land leased out for agricultural purposes, is governed by Art 32 Sch. II of the Limitation

¹ Finucane and Amir Ali's B. T. Act, 1st Ed., 552.

² *Kali v. Fazle*—9 Cal. 843.

³ *Jogeshari v. Mahomed*—14 Cal. 33.

⁴ *Dulli v. Meher*—8 W. R. 138.

⁵ *Chunder v. Sirdar*—18 W. R. 218.

⁶ *Dhanukdhari v. Nathima*—11 C. W. N. 848.

⁷ Act VIII of 1885, Art I. Sch III.

Act (XV of 1877)¹. Where the primary relief sought is in effect a mandatory injunction directing the defendant to fill up a tank and to pay the plaintiff compensation for his alleged wrongful act, and the secondary relief is ejectment, which can not follow save on the defendant's failure to comply with that order, in other words it was contingent on that failure. Held—that Art. 32 of Sch. II of the Limitation Act applies.² The period of limitation runs from the time when the landlord becomes aware of the mis-use or breach complained of.³

There is nothing in law which prevents an occupancy raiyat from giving up the actual cultivation of the soil and *converting himself into a mere rent-receiver*, and even if he does so he is not liable to be ejected. This matter also has already been fully discussed. (iv) Raiyat turning rent receiver.

According to the principles of English law a tenant by setting up an adverse title to the land held under his landlord, forfeits all his rights as a tenant, becomes a trespasser and as such is liable to ejectment. But, in order to make a *disclaimer* sufficient, it must amount to a *direct repudiation of the relation* of landlord and tenant, or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it, and a renunciation by the party of his character as a tenant, either by setting up a title in another, or by claiming a title in himself. In each case it must be decided whether what has taken place does or does not amount to a disclaimer of the tenancy, and the Courts always lean against forfeiture of this kind. An omission to acknowledge the landlord as such by requiring further information is obviously not within the rule; for when a tenant refuses payment of rent and *demand's proof of the title* of the claimant, his refusal to pay rent until he knows who is the rightful owner is a negative pregnant with an affirmative that the true owner, when ascertained, would be paid. A refusal, therefore, on the part of the tenant to pay rent to the landlord until he is satisfied as to his title, is not such a disclaimer as would effect the termination of his tenancy. On the same principle, the rule does not apply to a case in which the tenant does (v) Denial of landlord's title.

Disclaimer what amounts to.

Soman v. Raghubir—24 Cal. 160=1 C. W. N. 223 distinguishing *nath v. Khetur*—6 Cal. 34: *Ganesh v. Gondour*—9 Cal. 147: *Sharoop sur*—26 564=3 C. W. N. 464.
haroop v. Jogessur—8 C. W. N. 464=26 Cal. 564
binda v. Kamizuddin—9 C. W. N. ccxvi.

not set up a title to the whole in himself or in others, but merely *questions the extent of the interest of the plaintiff* and his title to receive the entire rent. A partial denial of the title of the landlord cannot effect a partial forfeiture of the tenancy and confer upon the tenant two inconsistent characters, namely that of tenant in respect of an individual share of the lands included in the tenancy and of a trespasser in respect of the remainder. A mere renunciation of tenancy without denial of the landlord's title, though it may operate as surrender, cannot amount to a disclaimer.¹

Based on
estoppel.

This rule of forfeiture by disclaimer is only a particular application of the general principle of law that a man cannot approbate and reprobate; and the law upon the point appears to be founded on the doctrine of *estoppel* rather than of waiver of notice (to quit) by consent; the tenant by denying the existence of any tenancy as between him and the claimant, and thereby rendering an ejectment necessary, is estopped from afterwards proving that there was a tenancy from year to year existing between them, which ought to have been duly determined by notice to quit before action brought.²

Indian law.

T. P. Act, &c.

This doctrine of forfeiture by disclaimer of landlord's title was early adopted by the Courts in India in various decisions and then subsequently came to be embodied in the Transfer of Property Act.³ The same rule was also followed uniformly in cases governed by the old Rent Law (Act VIII of 1869 B.C.) which was repealed by the Bengal Tenancy Act (VIII of 1885).

B. T. Act.

But under the B. T. Act it is settled law that a disclaimer of the landlord's title does not work as a forfeiture of the tenancy where it is in operation. The reason is that the Act is exhaustive of the cases in which the landlord may eject his tenant and disclaimer is not one of them. As pointed by Wilson J:—"This Act, has made a material change in the law in this respect. The mode in which it has dealt with the subject of eviction of tenants from their tenures or holding, is to enumerate the things which shall be the grounds for a suit for eviction, and in express terms to exclude every other ground" (See S. 10, 18, 25, 44, 49 and 78 of the Act.) Upon a discussion of the several sections of the Act "it seems clear that under the present Rent Law, in all the cases to which it applies, there can be no longer any eviction on

No ground.

¹ *Pratap v. Biran*, 19 C. L. J. 77=20 I. C. 823.

² *Mallika v. Mak.*, 1-2 C. L. J. 389.

³ Act IV of 1882, S. 111 (g).

the ground of forfeiture, incurred by denying the title of the landlord."¹ But it has been held in some cases that where the denial of the plaintiff's title by the defendant *has been given effect to in the suit for rent* (that is where the question whether the relationship of landlord and tenant under the B. T. Act existed was at issue in another suit and the court found that it did not and passed a decree accordingly) the defendant is *estopped* by a matter of record from pleading his tenancy, and the rule that the denial of the landlord's title does not work as a forfeiture of agricultural tenancies has no application.² But, as observed by Justice Sir Ashutosh Mookerjee :—"To hold that a tenant * * * may be evicted because, by reason of the doctrine of estoppel he is debarred from pleading his tenancy, seems to us to be an application of the doctrine of forfeiture by disclaimer without the formal use of the expression"³. For, as stated before, the rule itself is founded upon the principle of estoppel. But, in spite of the opinion thus expressed, it has been pointed out in a very recent decision of the Calcutta High Court that it is settled law that where the denial of the relationship of landlord and tenant has been followed by a decree affirming the denial, the landlord, on proof of his title, cannot be resisted in his suit for ejectment. The reason given is that the decree has decided the relationship of the parties. Where, however, a rent suit was not proceeded to judgment but *withdrawn*, and no connection between the disclaimer and withdrawal of the suit was established. *Held* that there was no estoppel against the defendant in a subsequent suit for ejectment on the ground of denial of landlord's title. The disclaimer by itself could not terminate the tenancy.⁴ But the denial by a defendant of his landlord's title in the *written statement*, would not entitle the plaintiff to a decree for ejectment on the ground of forfeiture in that suit.⁵ For the cause of action must be based on something which accrued antecedent to the suit. Where, therefore, a disclaimer is relied on, it must appear to have been made before or

Denial given effect to by decree

Denial in written statement.

¹ *Debiruddi v Abdur*—17 Cal 196 followed in *Dhora v Ram*—20 Cal 101.

² *Nilmadhab v Ananta*—2 C. W. N. 755; *Fayz v Aftafuddin*—6 C. W. N. 575.

³ *Mallika v Makham*—2 C. L. J. 389=9 C. W. N. 928.

⁴ *Ahad v Narain*—19 C. W. N. clxxvi

⁵ See *Mallika v Makham*—2 C.L.J. 389=9 C.W.N. 928. *Nizamaddin v Mamtaruddin*—28 Cal 135; *Madan v Rajah*—28 Cal. 243; *Vithu v Dhondi*—15 Bom. 407; *Madhuban v Attri*—15 Mad. 723.

on the day mentioned in the writ of ejectment as the time when the claimant was entitled to possession.¹

Denial by
recorded
tenant—Its
effect on
unrecorded.

But the denial of the landlord's title by the *recorded tenant* cannot operate as a forfeiture of the tenancy in so far as the *unrecorded tenants* are concerned. For, though he represented the tenancy in the books of the landlord and was entitled to bind his co-sharers for the purposes of the tenancy, he must be taken to have acted beyond the scope of his authority when he repudiated the tenancy. And as there cannot be a forfeiture of the tenancy in part the tenancy still subsists. A suit for ejectment in such a case must therefore fail. But there is no reason why the plaintiff should realise rent from all the defendants on the footing that the tenancy subsists².

Where disclaimer operates as a forfeiture no notice to quit is necessary before ejectment of the tenant³.

Now a tenant, who renounces his character as a tenant of the landlord, by setting up, without reasonable or probable cause, title in a third person or himself, is liable to have a decree for damages passed against him.⁴

(vi) Transfer
of whole or
part of
holding.

The sale or parting with a part of a holding is not a ground for forfeiture under the B. T. Act even where the occupancy holding is non-transferable, unless the occupancy raiyat abandons the holding altogether in the sense of the Bengal Tenancy Act. But where the sale is of the *whole* of the holding the landlord is ordinarily entitled to re-enter.⁵ But where there is a stipulation that the lessee would not transfer the land leased to him, he cannot be said to have *voluntarily* transferred his interest when the land is sold against his will by the act of a court.⁶ But a covenant for re-entry by the landlord upon an involuntary sale is valid and operative in law.⁷

(vii) Sale of
estate for
arrears of
revenue.

An occupancy raiyat is further protected from eviction at the instance of an auction-purchaser of an estate sold for *arrears of government revenue*. The Revenue Sale Law lays down that such a purchaser acquires "the estate free from *incumbrances*", but he is not entitled "to *eject* any raiyat

¹ *Mallika v Makham*—2 C. L. J. 389=9 C. W. N. 928.

² *Birendra v Bhubaneswari*—39 Cal 903.

³ *Anandamoyi v Lakhi*—33 Cal 339; *Khatel v Sadruddi*—34 Cal 922.

⁴ S. 186 A added by Act I of 1907 B. C. and E.B. and A to Act VIII of 1885.

⁵ See *Ante*.

⁶ *Nilmadhab v Narattam*—17 Cal. 826.

⁷ *Dcarika v Mathura*—24 C. L. J. 40.

having a right of occupancy at a fixed rent", even though he may hold under a lease granted by the defaulting proprietor or tenure-holder.¹ The right of such a raiyat being statutory, he is expressly protected, notwithstanding that his occupation was originally based on a grant by the defaulter.² The protection which the laws offer to occupancy raiyats at fixed rates is not one of the ordinary exceptions but is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land, who are in actual occupation of the soil and are cultivating it. The term "*right of occupancy at fixed rates*" meant in the year 1859 (when the law was passed) apparently the successors of *Khademi Khud Kasht* raiyats in the Regulations, while the ordinary *Khud Kasht* raiyats became occupancy raiyats. The intention of the Legislature, therefore, was that these *Khademi Khud Kasht* raiyats should not only not be liable to *ejectment*, but should not be liable to *enhancement* rent; and to these persons have succeeded what the B. T. Act now classes as "*raiyls at fixed rates*". Raiyats holding at fixed rates, therefore, are primarily the persons referred to in the proviso to Section 37 of Act XI of 1859. But in a case long after the B. T. Act came into force, Mitra J., has laid down that the right of occupancy that is hereby protected is not limited to the right that could be acquired under the rules laid down in Act X of 1859 but also covers "a right of occupancy that might be acquired under laws promulgated since 1859."³ The protection therefore has been extended by recent rulings under B. T. Act from these *Khademi Khud Kasht* raiyats or raiyats-at-fixed-rates to all classes of occupancy raiyats.⁴ The matter has been discussed fully while dealing with the question of enhancement of rent.

The B. T. Act also offers similar protection to the occupancy raiyat when the tenure within the ambit of which his holding is situate is sold for the arrears of its own rent. It lays down that a purchaser at a sale for an arrear of rent shall always take subject to certain interests which are called "*protected interests*"⁵, among which it

(viii)
Sale of tenure
for arrears
of rent.

¹ Act XI of 1859, S. 37.

² Sarada Mitra's *Land Law of Bengal*—Tagore Law Lectures 1894, 304.

³ *Sarat v. Asiman*—8 C. W. N. 601=31 Cal 725; but see *Bhut v. Manmatha*—11 C. L. J. 98=13 C. W. N. 1025 which does not deal with this question.

⁴ *Abdul v. Makbul*—22 C. L. J. 223=20 C. W. N. 185.

⁵ Act VIII of 1885, S. 159.

includes the right of occupancy.¹ A decree for ejectment cannot, therefore, be made against even an under-raiyat with a right of occupancy at the instance of such a purchaser.²

(ix)
Sale of Patni
under Reg.
VIII.

The *Astam* sale protects from ejectment only the *Khudkasht raiyats* or *resident and hereditary cultivators*”³ as opposed to the *paikasht* raiyats or raiyats who are residents of another or neighbouring village and cultivate land near their own village who are not similarly protected from eviction. The distinction between the *Khudkasht* and the *paikasht* raiyats is nowhere mentioned in the Rent Act of 1859, though it is alluded to as still existing in some of the later enactments, *Eg* Act VIII of 1865. The broad distinction existing since then between the rights of the actual cultivators is the creation of that Act which divided them into raiyats having rights of occupancy and those having no such rights and are merely temporary tenants or tenants-at-will. The question therefore arises: Is an occupancy or non-occupancy holding protected under S. 11 cl. 3 of Reg. VIII of 1819? As all occupancy raiyats are not necessarily “*resident and hereditary*,” these words, if strictly construed, would exclude a good many of the occupancy raiyats from the protection. As the words stand, at present an *occupancy* (or a non-occupancy) *holding, if not held by a Khudkasht raiyat*, that is a resident and hereditary cultivator, is not an incumbrance and not protected from ejectment by the terms of S. 11 Cl. 3 Reg. VIII and may be annulled by a purchaser at a sale held under the Regulation.

Resident
occupancy
raiayat only
protected.

Not non-
resident
occupancy
raiayats.

There is no doubt that originally a *paikasht* or non-resident raiyat could be ejected by an auction-purchaser at an *Astam sale* and the law in this respect is still the same. A *paikasht* cultivator, even if he might have acquired a right of *occupancy* under the subsequent Rent Laws, is still liable to be ejected at the instance of such a purchaser.⁴ Such is also the case when an under-tenure, such as *Darpatni* is sold for arrears of rent.⁵

Their posi-
tion anom-
alous.

The position of a *paikasht* raiyat, if he acquired a right of occupancy, is therefore still anomalous. For, although he is protected from eviction at the instance of a purchaser at a

1*ibid*, S. 160.

Debi v. Asutosh—20 Ind. Cas. 55.

Regulation VIII of 1819, S. 11(3).

Jogeshwar v. Abed—3 C. W. N. 13.

Act VIII of 1865, B.C. S. 16.

sale for arrears of rent under the B. T. Act or even for arrears of revenue under the Revenue Sale Law, he is, as we have seen, liable to be ejected by a purchaser at a sale held under the *Patni* Regulation. Act X of 1859 no doubt did away with the distinction of *Khudkasht* and *paikasht* raiyats and introduced in its place the distinction between occupancy and non-occupancy raiyats, but we find that the old distinction still remains for the purposes of that Regulation. The protection afforded by it ought now to be extended to all occupancy raiyats irrespective of their origin and residence in the village, especially as now under the B. T. Act "settled raiyats" necessarily acquire occupancy rights in all lands held by them in the same village, and an occupancy raiyat need not necessarily be "resident" and "hereditary," and, therefore there is not much difference between a *Khudkasht*, settled and an occupancy raiyat.¹

Amendment
of law desirable.

In the case of the sale of an under-tenure for arrears of rent under Act VIII B.C. of 1865 the auction-purchaser is not entitled "to eject *Khudkasht* raiyats or resident hereditary cultivators"² and the expression "*Khudkasht raiyats*", as used here, means "resident hereditary cultivators."³ A tenant's occupancy right is not avoided by the operation of S. 16 of the Act.⁴ Even when a tenant was not in possession of lands as a resident hereditary cultivator within the meaning of the section, and not an occupancy raiyat, when he took a *mokurari* lease of the same, but went on cultivating the land thereafter for a period of more than twelve years and thereby acquired an occupancy right, he retained the occupancy right, even though the *mokurari* right, which he had also obtained, was extinguished by the operation S. 16 of the Act on a sale of the tenure for arrears of rent. He was not therefore liable to be ejected. Reg. VIII of 1819 did not recognise occupancy right not then in existence but in the Act of 1865 occupancy right acquired under Act X was also recognised.⁵

(x)
Sale of under-
tenure under
Act VIII B.C.
Sec. 1865.

¹ See Sarada Mitra's *Land Law of Bengal*, 305.

² Act VIII of 1865 B.C. S. 16.

³ *Koontee v. Hirdoy*—16 W. R. 206.

⁴ *Emani v. Atar*—22 W. R. 133.

⁵ *Bama v. Ram*—19 C. W. N. 858, distinguishing, *Jogeshwar v. Abid*—3 C.W.N. 13, following *Purdeg v. Purtab*—11 W.R. 253; *Nilmadhab v. Shibū*—13 W. R. 410; *Emani v. Atar*—22 W. R. 133.

§ 3. USE OF LAND.

Use of land. The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent, liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted.

Under old law restricted to propose of tenancy. Under the old law the right of the tenant to use the land was *restricted to the purpose* for which the tenancy was created, and in any case of any attempted diversion, the landlord was entitled to restrain the raiyat. And although the Courts were inclined to place a liberal interpretation on the right of the tenant to use the land in his occupation, they did not sanction a *complete change* in the mode of enjoyment¹. Accordingly, though in an early case under Act X of 1859 it was said that a raiyat with a right of occupancy might erect a *pucca house* on his land and do what he liked with it, so long as he did not injure it to the Zemindar's detriment,² in a later case it was however held that the Zemindar was entitled to object to the erection of *brick houses* on land let for purposes of cultivation or to the doing in fact of anything which would *substantially alter the character of the tenure*.³

Complete change. Thus, as the tenancy was created for ordinary agricultural purposes, *e.g.* for cultivating paddy or other crops, the raiyat was not allowed to *excavate a tank* on the land or any part of it, in contravention of the terms of his lease⁴ or dig earth for the purpose of *making bricks*.⁵ It would also seem from the decided cases that the conversion of paddy land into a *garden* for horticultural purposes was a misuse of the land.⁶

Erection of brick house.

Excavation of tank.

Making brick.

A garden.

Under B. T. Act. Under the B. T. Act the occupancy raiyat is enjoined not to use the land of his tenancy in such a manner as to *materially impair its value or render it unfit for purposes of the tenancy*.⁷ The question whether a particular user of the land is or is not such, is, as the Privy Council

¹ *Lal v. Deo*—3 Cal. 781=2 O.L.R. 294.

² *Nyamatullah v. Govind*—6 W. R. (Act X) 40.

³ *Shib v. Baman*—15 W. R. 360=8 B. L. R. 242; *Jagat v. Ishan*—24 W. R. 220; *Lall v. Deo*—3 Cal. 78.

⁴ *Tarini v. Deb*—8 B. L. R. App. 69. *Manindra v. Maniruddin*—11 B. L. R. App. 40=20 W. R. 230.

⁵ *Kadambini v. Nobin*—2 W. R. 157; *Anand v. Bissonath*—17 W. R. 416.

⁶ *Sarada Mitra's Land Law of Benyal* 301. *Soman v. Raghubur*,—21 Cal. 160.

⁷ Act VIII of 1885, S. 28.

pointed out, a question of fact and must depend upon the circumstances of each case. What has to be considered is the effect of the act upon the entire land comprised in the tenancy.¹ Thus where a holding comprised 66 Bighas and the tenants sublet 4 Bighas to an under-lessee who excavated a tank on two bighas, and it was found that the tank had not rendered the land of the tenancy unfit for the purposes thereof, but was a practical necessity held—that the raiyat could not be ejected under S. 25(2) B.T. Act.² Regard must be had to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation.¹ But the purpose for which a portion of the holding is withdrawn from actual cultivation must be directly connected with agriculture.³ Thus the cultivation of indigo is an agricultural purpose and the manufacture of indigo cakes out of indigo plants is also an object directly connected with agricultural pursuits. And it cannot be laid down as a broad proposition of law that the building of an indigo factory on land let out for agricultural purposes must generally render it unfit for the purpose of the tenancy. It is a question of fact and must depend upon circumstances of each case.¹ The erection by the raiyat of a suitable dwelling house on his land is not now prohibited. There is nothing in law to indicate that the suitable dwelling house must be one of a temporary description only. A house consisting of masonry walls supporting a corrugated iron roof is allowed.⁴ But where the purpose for which a portion of the land is sought to be withdrawn from actual cultivation is totally unconnected with agriculture (e.g. the establishment of a market) it is clear that the execution of the design will render the holding unfit for agriculture, for which purpose alone the land was let out to the tenants. And it is immaterial that the proposed market will occupy not more than one-tenth of the area of the entire holding, that circumstance cannot affect the nature and character of the unauthorised act.³

Test of.
Depends on
circum-
stances of
each case.

Distinction
between
purpose
connected
and
unconnected
with
agriculture.

S. 23 is applicable not only to cases where the land is made permanently unfit but also to cases where it is made temporarily unfit, for the purpose of the tenancy.³

¹ *Hari v. Surendra*—6 C. L. J. 19 P. C.=34 Cal. 718 P. C.=11 C. W. N. 794=L.B. 34 I. A. 133.

² *Saurendra v. Rahim*—15 Ind. Cas. 497.

³ *Rajkishore v. Rajani*—23 C. L. J. 85=20 C. W. N.

⁴ *Hari v. Baroda*—8 C. W. N. 754=31 Cal. 1074.

Landlord's
remedy for
improper use.

In cases of such improper use of the land, the landlord is entitled to ask for an *injunction* for restraining the conversion and for *damages* to the extent of the actual loss sustained by him. It is inequitable and unjust to compel the raiyat to fill up the tank or remove the structures or the fruit trees he might have planted. It is also inequitable to award as damages an amount that may be necessary for filling up the tank or other excavation. The *measure of damages* should be regulated by a calculation of the probable loss that may in future be sustained by the landlord. Estimate the letting value of the raiyati land upon the conversion and that subsequent to it, and the actual loss of the landlord will be so many years' purchase of the annual loss ¹. Further the landlord is entitled to bring a suit for the *ejection* of the tenant ². This point is discussed elsewhere.

¹ Sarada Mitra's *Land Law of Bengal* 301: See *Nyamutullah v. Govind*—6 W. R. (Act X) 40: Specific Relief Act I. of 1877 S. 54.

² Act VIII of 1885, S 25.

§ 4. RIGHT TO MAKE IMPROVEMENTS ON HIS HOLDING.

Under the B. T. Act an occupancy raiyat has a right to make "*improvements*" in his land ¹ and "*improvements*, have been defined to mean "any work which adds to the value of the holding, which is suitable to the holding, and which is consistent with the purpose for which it was let," such as, e.g. wells, tanks, water channels, suitable dwelling houses for the raiyat and his family with necessary out-houses². In order to be an *improvement* two elements are necessary:—(a) that the work adds to the value of the holding. No work executed by the raiyat of the holding would be an improvement if it substantially diminishes the value of his landlord's property; and, (b) that it is suitable to the holding and consistent with the purpose for which it was let.

Right to make improvement.

What it means.

The tenant was not entitled under the old law³ (nor is he entitled under the present enactment) to *change the entire character* of the land from what it was when he got it, or to make a permanent alteration of the landlord's property.⁴ To convert land leased for agricultural purposes into building land,⁵ or to make excavations for providing earth for bricks⁶ could not be what is known in English law as "*ameliorating waste*." The tenant can now *build a proper habitation* for himself on the land⁷. And, although the *digging of a tank* was, under the old law, regarded as altering the character of the holding and doing permanent damage to the landlord's property⁸, such an act can now, under the present law, be regarded as *ameliorating waste* if the tank was excavated for the purpose of agriculture or for the use of men and cattle employed in agriculture.⁹ But digging tank for good drinking water does not come within the section.¹⁰

Change in character of holding.

Building own house.

Making brick

Digging tank

Laying water pipe.

The work need *not* be executed on the holding itself. A water pipe brought from another place to the holding for purposes of irrigation, though not on the holding, would

Need not be executed on the holding.

¹ Act VIII of 1885, S. 77(1).

² *Ibid*, S. 76(1)—(2).

³ *Ananda v. Bissonath*—17 W. R. 416.

⁴ *Finucane and Amir Ali's Bengal Tenancy Act*, 1st Ed, 329.

⁵ *Hari v. Baroda*—30 Cal. 1014=8 C. W. N. 754: S. 76 (f) B. T. Act.

⁶ *Kadambini v. Nobin*—2 W. R. 157.

⁷ *Tarini v. Ramjee*—23 W. R. 298.

⁸ *Noyna v. Rupikun*—9 Cal. 609.

⁹ Act VIII of 1885, S. 76(2) (a) See also *Gobinda v. Kamijuddi*—16 C. L. J. 127.

¹⁰ *Finucane & Amir Ali's B. T. Act*, 1st Ed. 328.

Executed for its benefit or made beneficial to it. be an improvement.¹ So long as it is executed *directly for its benefit or is after execution, made directly beneficial to it* it is an improvement. For example, a tank made in the vicinity of a holding, not primarily for its benefit, but used for that purpose after excavation, would equally be an improvement.²

Respective rights of landlord and raiyat.

An occupancy raiyat possesses an equal right with the landlord to make improvements in respect of the holding in his occupation; and neither the landlord nor the raiyat can "*as such*" restrain the other from making the improvement "except on the ground that he is willing to make it himself." But if the raiyat wishes to carry out the work he would have the prior right, unless the improvement is of a *general nature and affects another holding or other holdings* under the same landlord; in such a case the landlord would have the prior right. The Collector is to decide questions as to right to make improvement and his decision shall be final.³

Compensation for improvement in case of ejectment.

In all cases of ejectment, whether under decree of the Court or otherwise, the raiyat becomes entitled to compensation for his improvements, and the Court making the decree or order for ejectment, shall make it conditional on the payment to the raiyat of the amount of compensation which also it shall determine. But where the raiyat makes the improvement in pursuance of a contract or under a lease in consideration of some substantial advantage to be obtained by him and he has obtained that advantage, he cannot claim any compensation for such improvement⁴. Thus the raiyat may obtain a lease on a reduced rental in consideration of clearing or digging a tank, and if, pursuant thereto, he makes the improvement he would not be entitled to compensation therefor. Other cases of similar character may be easily conceived. Nor would a raiyat be entitled to compensation if he voluntarily abandons or surrenders his holding. A non-voluntary removal from his holding only entitles the raiyat to compensation.⁵ No raiyat can contract himself out of his right to claim compensation for an improvement.⁶ The matter is further discussed where the subject of ejectment of the raiyat is dealt with.

¹ Act VIII of 1885, S. 77

² Finucane & Amir Ali's B. T. Act, 1st Ed. 328.

³ Ibid S. 78

⁴ Act VIII of 1885 S. 82 (1)—(3).

⁵ Finucane & Amir Ali's B. T. Act, 1st Ed. 333

⁶ Act VIII of 1885, S. 178 (1).

§ 5. RIGHT TO TREES.

The property in the trees is, by the general law, vested in the Zemindar; his proprietary rights are subject to modification, or it may be, to complete extinction, by custom; but failing the proof of such a custom, his right subsists unimpaired.

Under the former law it was decided that, though a tenant had a right, during the continuance of his tenancy, to the exclusive possession of the trees on his land¹ and to enjoy all the benefits of a growing timber during his occupation, he had no right to cut down the trees and convert the timber to his own use. The Zemindar had a right to the trees grown up on his land by the tenant and was held entitled to sue to have his right in the trees declared.² But the raiyat could prove custom or usage to the contrary. Ordinarily, the custom of paying *chonths* or fourth part of the price of trees cut down, even if planted by the raiyat himself, prevails in many districts, on payment of which the raiyat becomes entitled to the trees.³

The B. T. Act has, in this respect, improved the right of the occupancy raiyats.⁴ Now, under the terms of the Act, the raiyat may cut down trees on his land, without the landlord's consent, unless there be a custom to the contrary, of which it is for the landlord to give evidence.⁵ There is a presumption now in favour of the raiyat as to the existence of the right of cutting down trees, whether they have been planted by him or not. Custom or local usage to the contrary may be invoked by the landlord to take away the right of the raiyat.⁶ The *onus* of proving that there is a custom against the tenant with occupancy rights cutting down the trees is no doubt on the landlord, and not on the tenant to establish the contrary.⁷ The raiyat cannot, by any contract with the landlord, deprive himself of the right. Such a contract has been declared illegal.⁸

But there is a distinction between the right of merely cutting down the trees and that of appropriating them after they have been felled. The trees are the property of the proprietor of the land on which they grow, though the

Mahomed v. Bolaki—24 W. R. 330.

Abdul v. Dataram,—W. R. S. P. (1864) 367.

Saroda Mitra's Land Law of Bengal, 301.

Act VIII of 1885, S. 23.

Nafar v. Ram—22 Cal. 742.

Ibid. Girja v. Mia—22 Cal. 744 N; *Samsar v. Lochin*—23 Cal. 854.

See 3 above.

¹ Act VII of 1885, S. 178 (3) (b).

tenant has a right to enjoy all the benefit that the growing timbers may afford him during his occupancy, and to cut them down, subject to a custom to the contrary.¹ In the absence of a custom to the contrary, the right to *appropriate* any trees in the land after they have been cut down is in the landlord; this is quite a different thing from the right to cut down trees.² The tenant is entitled to *cut down trees*, provided there is no local custom to the contrary, but he can *appropriate* the trees, when felled, only when such appropriation is sanctioned by custom.³ And the burden of shewing that the raiyat has a right to *appropriate* them after they have been felled is on him.⁴ On his failure to establish such a custom he is liable for damages.

Onus.

But this *liability* may again be *limited by custom*. For example, the Zemindar may, by a custom of the zemindari, only be entitled to receive a certain proportion of the value of the trees cut down by the raiyats with his consent.⁵ The *onus* of proving such a custom is also on the raiyat.

Right may be modified or extinguished by custom

Illustration.

Growth of such custom.

Thus the proprietor's rights to the trees are subject to modification or complete extinction by contract or custom. The following case affords an illustration of a landlord's right in trees being *extinguished by contract*. A lease was granted for the express purpose of clearing jungle and bringing it under cultivation, and there was no reservation in the lease of the right in the trees, it was held that lessee had the right to appropriate them when cut.⁶ The landlord's right in this respect may also be *extinguished by custom*. When a landlord acquiesces in an appropriation by his tenants of the trees in their holdings, such acquiescence leads to the growth of a custom or usage which is binding on him, and the position of the parties becomes the same, as if the landlord has expressly granted to the tenants a right to appropriate the trees. Where, therefore, tenants who have originally no right to appropriate trees which have been felled, are allowed to do so, and this course of dealing is acquiesced in for a length of time and in numerous instances, it ultimately entitles the

¹ See Rampini's B. T. Act, 4th Ed. 111 : *Setab v. Dubal*—6 C. L.J. 218 (222) : *Kausalia v. Gulab*—21 All 297. *Ganga v. Badan*—30 all 134.

² *Mahomed v. Ali*—10 C.L.J. 25.

³ *Prodyote v. Gopi*—11 C.L.J. 209=14 C. W. N. 487=37 Cal. 322 :

⁴ *Naffar v. Ram*—22 Cal. 742 : *Kausalia v. Gulab*—21 All 297. Contra in *Pyari v. Narayan*—22 Cal. 746n.

⁵ *Nafar v. Huzur*—22 Cal. 761N.

⁶ *Manmohini v. Raghu*—23 Cal. 209.

tenants to a customary right of appropriation, tacitly incorporated into their contract, and the result is a substantial encroachment upon the rights of the landlord.¹ A customary right of this description in favour of a resident hereditary cultivator must be regarded as a *bona-fide* engagement with him which an auction-purchaser at a public sale (*i.e.* a revenue or an *Astam* sale) is not entitled to abrogate. It is however an incumbrance which he is entitled to annul. The following case in which it was found that by the custom of the Zemindari, the Zemindar was entitled to recover only one-fourth share of the value of the trees cut down by the tenants, when the raiyats had them cut without his consent or permission² affords an example of the *modification* of the landlord's right in this respect *by custom*. So where there was a custom in a village that the raiyats could, when they required fire-wood for the purposes of cremation and on occasions of village feasts, appropriate *agachha* or valueless trees grown on their holdings after they had been inducted into possession, with the permission of the village headman, without any payment and without the consent of the landlord, it was held, in a case in which certain *agachha* trees had been cut down without such permission, that the landlord, could have sustained no damage by reason of the acts of the raiyats in cutting and appropriating the trees.³

Under the B. T. Act the right of the landlord or the tenant on trees does not depend upon the fact whether the tree comes within the category of timber or not. It would seem that the raiyat would have a title to *all* windfalls of wood upon his holding unless there is a custom to the contrary.⁴ A different rule has, however, been laid down in the North-Western Provinces with regard to the fallen wood of self-sown trees. It has there been held that a Zemindar claiming a right to the fallen wood of self-sown trees growing on an occupancy holding, must prove some custom or contract by which he is entitled to such wood, there being no general rule in India to the effect that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.⁵

No destruction between timber and *agachha*.

In the absence of special agreement, a tenant has, as against his landlord, a right to insist that so long as his

Landlord can't cut down trees during tenancy.

¹ *Prodyot v. Gopi*—11 C. L. J. 209 = 14 C. W. N. 487 = 37 Cal. 322.

² *Nafar v. Nand*—22 Cal. 751 n.

³ *Samsar v. Lochin*—23 Cal. 854.

⁴ *Finucane*—Amir Ali, B. T. Act, 1st Ed. 142.

⁵ *Nathan v. Kamala*—13 All. 571.

tenancy continues, the landlord shall not cut down trees standing on the tenant's holding.¹

Limitation
for suit for
compensation
for removing
trees cut.

The period of limitation for a suit to recover compensation for removal of trees after they have been cut down is that mentioned in Art 48 or 49 and not Art 36 of schedule 2 of the Limitation Act, 1877. Such a suit is cognizable by a Court of Small Causes².

Trees grown by the tenant during his tenancy accede to the soil and become the property of the landlord, on the termination of the tenancy, unless the tenant uses, during its subsistence, his right of removing the trees, provided that the right is not taken away by contract.³ A tenant of homestead land can cut and appropriate fruit trees grown by him or his predecessor in interest on the holding.⁴

¹ *Badan v. Ganga*—29 All 484; *Kausalia v. Gulub*—21 All 297
Ruttonji v. Collector—11 M. I. A 205.

² *Fatik v. Atas*—15 C.L.J. 225.

³ *Chattar v. Viltat*—W.R. S. P. 223; *Ameerun v. Sunjada*—11 W. R. 226.

⁴ *Mafez v. Rasiklat*—12 CLJ 246=37 Cal. 815=14 C. W. N. 952.

§ 6. RIGHT TO SUB-LET.

The right to *sub-let* his holding is an important incident of the occupancy right. The right is, no doubt, inconsistent with the original purpose of cultivation which, as we have seen, lies at the inception of occupancy right. The right, which however is frequently exercised by the raiyat, makes it very difficult to distinguish him from a tenure-holder on the one hand, and an under-raiyat on the other. His position becomes, to all appearances, that of a middle-man or a tenure-holder if he ceases to cultivate the land and is satisfied with receiving rent from the under-raiyat to whom he sub-lets it. If, in addition, his interest is transferable by custom, and if, for a long time he has held the land through under-raiyats only, he becomes, in fact, a middle-man, though, in the eye of the law, he still continues to be an occupancy raiyat, the under-raiyat not being allowed, except under very peculiar circumstances, to acquire the status of the occupancy raiyat. But a raiyat with a right of occupancy may, for various reasons, be prevented from cultivating *all* his lands, and it would have been extremely hard if the privilege of sub-letting were denied to him. The legislature, therefore, has wisely conferred on the raiyat the privilege of occasionally letting out his land or portion of it to under-raiyats.¹

Sub-lease by raiyat.

Difficulty in distinguishing him from tenure holder.

Accordingly, under the old law, a raiyat with a right of occupancy could sub-let his land without incurring the forfeiture of his tenancy², and the mere fact of sub-letting did not make the raiyat a middle-man.³ He could grant even a *mukurari* lease to another, but it would be binding as between the contracting parties only and did not affect the rights of landlord.⁴ Where the landlord however gave the raiyat power to sub-let the sub-lessee obtained right against both the landlord and the raiyat, of which he could not be deprived without his own consent.⁵ A lessee could not make an underlease for a longer period than that of his own,⁶ and sublessees had no more right to use the land in contravention of the terms of the original lease than their lessors had.⁷

Under old law.

¹ Sarada Mitra's 'Land Law of Bengal' 305-306.

² *Kally v. Ram*—9 W.R. 344; *Harun v. Mukta*—10 W.R. 113=1 B.L.R. A.C. 81; *Jamir v. Gonai*—12 W.R. 110=13 B.L.R. 278 N.; *Khosai v. Joy-nuddin*—12 W.R. 441.

³ *Ram v. Lakshi*—1 W.R. 71; *Karu v. Lachmipat*—7 W.R. 15; *Durga v. Kalidas*—9 C.L.R. 449.

⁴ *Damri v. Bissessar*—13 W.R. 291.

⁵ *Nihalunnissa v. Dhanu*—13 W.R. 281.

⁶ *Harish v. Srikali*—22 W.R. 274; *Sarat v. Binay*—25 W.R. 347=L.R.

5 I.A. 164=3 C.L.R. 140.

⁷ *Monindra v. Moniruddin*—20 W.R. 230.

Under B. T.
Act.

Under the B. T. Act the raiyat may *sub-let* his holding, subject to certain restrictions.¹ Where the original purpose for which the land was acquired is clearly shewn, a tenant, who acquires land for his own cultivation and subsequently lets it out to under-raiyats, would not lose the *raiya*ti right (and with it the right of occupancy which he might have acquired) and convert himself into a tenureholder as between himself and as his landlord. And once the grant is clearly shewn to be *raiya*ti, the mere fact that the tenant subsequently sub-let the land would not alter the character of the tenancy.²

Contract in
bar void.

Nothing contained in any contract between a landlord and a tenant after the passing of this Act shall take away the right of an occupancy raiyat to sub-let his land subject to and in accordance with the provisions of the Act.³

Sub-lease
when valid
against land-
lord.

As already stated, occupancy raiyats are now entitled to sublet, but in order that the sublease may be valid *against the landlord* it must comply with two conditions:—(a) it must be by a *registered* instrument, and (b) it must be for a term *not exceeding nine years*. Apparently, a sub-lease, if registered and for a term not exceeding nine years, is valid against the raiyat's landlord, whether *he consents to it or not*. If the landlord *consents*, it is of course valid as against him.

Sub-lease
against S. 85
Effect of.

A sub-lease shall not be admitted to registration if it purports to create a term *exceeding nine years*.⁴ A sub-lease for a period of more than nine years, which has been registered in contravention of the above rule, is *not operative against the superior landlord* of the occupancy raiyat, and altogether *void*, in spite of such registration.⁵ There is nothing in the Act authorising the court to *split up* the contract of sub-letting into two parts, a *valid* portion extending to a period of nine years and an *invalid* portion for the remainder of the term.⁶ Such a sub-lease must be deemed as *unregistered*, and under S. 49 of the Registration Act such a document is *inadmissible* in proof of any transaction affecting such property. Oral evidence of such

¹ Act VIII of 1885, S. 85.

² *Baidya v. Sudharam*—8 C.W.N. 751; *Pramatha v. Nilmani*—15 C.W.N. 902; But see *Mahesh v. Manbhandra*—5 C. L. J. 522: vide Chapter I, page 13.

³ Act VIII of 1885 S. 178 (3) (8).

⁴ Act VIII of 1885, S. 85.

⁵ *Sri v. Sarada*—26 Cal. 46; *Ramgati v. Shyama*—6 C.W.N. 19; *Sitanath v. Basudeb*—2 C.L.J. 540; *Gopal v. Ishan*—29 Cal. 148; *Telam v. Adu*—17 C.W.N. 468.

⁶ *Fakir v. Banamali*—18 C.L.J. 252=19 C.W.N. 412.

grant is also excluded by S. 91 of the Evidence Act.¹ It is equally void if the sub-letting was otherwise than by a registered document.²

The question whether a sub-lease granted in contravention of S. 85 B.T. Act is binding *as between the parties and their representatives* or is entirely void has not yet been settled. The cases on this point are numerous and difficult to reconcile. Conflict of views.

In some cases it has been held that the invalidity of the sub-lease granted in contravention of these provisions can be raised *only by the landlord* of the raiyat³ or by the holder of a derivative title from him. A contract of tenancy of this description is valid, so far as the *contracting parties and their representatives* are concerned. They are not entitled as between themselves to take up the position that the grant is inoperative.⁴ It is well-settled that the creation of the complete relation of landlord and tenant has the effect in law of *estopping the tenant from denying the validity of the title* which he has admitted to exist *in the landlord*; the estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. The under-raiyat, therefore, cannot show that the lease is void and that no interest has passed to him. Binding between raiyat and his leasee.

But, as pointed out by the Judicial Committee and the House of Lords, estoppels are, as a general rule, *mutual* or reciprocal *i.e.*, bind both parties. The parties to the contract are, therefore, mutually bound by the terms of the lease. Consequently it is no more open to the under-raiyat than to the raiyat to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution, and the contracting parties had enjoyed benefits thereafter. The doctrine of estoppel

¹ *Jarip v. Darpa*—15 C.L.J. 144; *Telum v. Adu*—17 C.W.N. 468 followed in *Mohim v. Baidya*—21 C.L.J. 478.

² *Peary v. Badul*—28 Cal. 205=5 C.W.N. 310.

³ *Manik v. Bani*—13 C. L. J. 649 [in which Mookerjee J. on a review of the earlier cases came to the above conclusion which is quite opposed to that of Coxe J. in *Telum v. Adu*—17 C. W. N. 468 also in *Jarip v. Dorfa*—16 C. L. J. 114=17 C. W. N. 59] followed in *Bamandas v. Nilmadhab*—20 C. W. N. 1340=24 C. L. J. 541; *Gonesh v. Thanda*—24 C. L. J. 539. See also *Abdul v. Abdul*—16 C. W. N. 618.

⁴ *Arab v. Rochimuddin*—13 C. L. J. 656 and the cases cited there.

binds both and debars each from disputing the validity of the lease to the detriment of the other¹.

The justice of the view is obvious. Suppose after the lessee has gone into possession and the lessor sues to eject him on the plea that he is an occupancy raiyat and that the sub-lessee is consequently void under S. 85 (2), the lessee will plainly be entitled to rely on the doctrine of estoppel to defend his possession.

Thus, as pointed out by Mookerjee, J., in a very recent case¹ :—"A long line of cases affirm the view that a lease granted in contravention of S. 85(1) is *operative* and binding as between the grantor and the grantee.² This conclusion may be supported on one of two grounds, namely, first, that the validity of a lease granted in contravention of S. 85(1) can be questioned only by the landlord of the grantor, or by the holder of a derivative title from him; or secondly, that the doctrine of *estoppel* binds the grantor and the grantee equally and debars each from disputing the validity of the lease to the detriment of the other."¹ Thus even when an under-raiyat holds under a *writ en lease for an indefinite term* the raiyat is not entitled to eject him by giving him notice under S. 49 (b) B. T. Act; he can be ejected only for non-payment of rent.³ An under-raiyat who holds under a *permanent lease* granted by the raiyat, can successfully maintain a suit for possession or defend his possession against the raiyat or his representative in interest, and it is not open to them in such a case to question the validity of the sub-lease on the ground that it was granted in contravention of S. 85 (2) B. T. Act.⁴

Totally void even against contracting parties or strangers.

The first of the principles stated above has not been universally accepted and is possibly in conflict with the rule enunciated in the cases noted below, according to which such a sub-lease is *totally void, even as against the contracting*

¹ *Bamandas v. Nilmadhab*—20 C. W. N. 1340=24 C. L. J. 541.

² *Madan v. Janaki*—6 C. W. N. 377; *Gopal v. Eshan*—29 Cal. 148; *Tamijuddi v. Asgar*—38 Cal. 256=13 C. W. N. 163; *Bepin v. Amita*—9 C. L. J. 76; *Arub v. Rochimuddi*—13 C. L. J. 656; *Ali v. Nayan*—15 C. L. J. 122; *Abdul v. Rahman*—16 C. W. N. 618=15 C. L. J. 672; *Janaki v. Prabhasini*—12 C. L. J. 99=19 C. W. N. 1077; *Lani v. Easin*—20 C. W. N. 948. The only case which supports the contrary view is *Basarutullah v. Kasirunnesse*—11 C. W. N. 190 which has not been followed in any subsequent decision.

³ *Madan v. Janaki*—6 C. W. N. 377; *Sangser v. Hadamulla*—18 Ind. Cas. 82.

⁴ *Manik v. Bani*—13 C. L. J. 649; in which most of earlier cases were cited and discussed; *Sadhan v. Lakan*—15 Ind. Cas. 255; *Gurudas v. Kalidas*—18 C. W. N. 882; *Parusulla v. Setal*—19 C. W. N. 1110.

parties or their representatives ¹, and a very recent case goes so far as to decide that it *cannot even be ratified* by the raiyat himself by acceptance of rent from the lessee ², the object of the section being to protect not only the landlords but also the raiyats against the effects of their own improvident Acts. ³ Strangers are therefore allowed to avail themselves of these provisions to defeat the title of the sub-lessee. Thus the auction-purchaser of the right, title and interest of the raiyat who has executed a permanent registered lease is not estopped from questioning the validity of the lease created by his predecessor in title. ⁴ In such a case the under-raiyat cannot have a better title than even a *trespasser* and it has been held in another very recent case that where the *under-raiyati lease* is for a term exceeding nine years, the document is not admissible in evidence and cannot operate to create any title in the lessee. Even the evidence of an *admission by the raiyat* that he granted the lease and that he took an adequate *Salami*, if it can be used against a third party, is not admissible, being evidence relating to the transaction of the lease in respect of which there is a document. Nor is it sufficient to prove the tenancy to shew that the *under-raiyat was in possession* of a portion of the land covered by the lease. ⁵ According to these authorities, under S. 85, even if the sub-lease has, in contravention of its terms, been registered, it is inadmissible in evidence; and *secondly*, that being so, under the provisions of S. 91, Evidence Act, oral evidence cannot be given as to the terms of the agreement. It is only necessary to refer in this respect to the cases cited already. ⁶

In some cases a mean position is taken on the basis of the principle laid down in several cases *viz.* that where a tenant cannot or does not produce his lease in writing, he can nevertheless, *establish his tenancy from possession and* Possession under such lease—effect of.

¹ *Jarip v. Darfa*—16 C. L. J. 144=17 C. W. N. 59; *Telam v. Adu*—17 C. W. N. 468 in which Coxe J. made a review of all the previous cases and came to the conclusion quite opposite to that of Mookerjee J. in *Manik v. Beni*—18 C. L. J. 193 in which also all the previous cases are cited and discussed. Also *Baishnab v. Ram*—19 C. W. N. CXL; *Nazir v. Banshi*—21 C. W. N. Clviii.

² *Mohim v. Baidya*—21 C. L. J. 478.

³ *Mohendra v. Parbati*—8 C. W. N. 136.

⁴ *Fazil v. Keramuddin*—6 C. W. N. 916.

⁵ *Kartic v. Bama*—20 C. W. N. 182 following *Jarip v. Darfa*—17 C. W. N. 59.

⁶ *Jarip v. Darfa*—17 C. W. N. 59: [Mookerjee J. points out in *Banandas v. Nilmadhab*—24 C. L. J. 541=20 C. W. N. 1340 that this case and *Telam v. Adu*—17 C. W. N. 468 do not affect the authority of *Manik v. Bani*—13 C. L. J. 649] *Ganesh v. Thanda*—24 C. L. J. 539, *Nazir v. Banshi*—21 C. W. N. Cl. viii.

other circumstances. It is urged that where the sub-lessee has proved prior possession, such bare possession is sufficient title against a trespasser.¹ Thus where an under raiyat is *in possession* as a sub-lessee he can *recover possession* (on being dispossessed) or *defend his possession* on the strength of a subsisting tenancy, which can be established from possession and other circumstances although he cannot produce his lease in writing by reason of the invalidity of the written lease.² Where the sub-lessee can not fall back upon prior possession, as tenant or otherwise, and the only title on which he can rely is a sub-lease granted by a raiyat for a term exceeding nine years, his suit to recover *Khas* possession even from a trespasser is dismissed.³ Even as between two claimants each of whom claims under a registered permanent sub-lease granted by the raiyat, it has been held in a recent case that as such a sublease, being *void*, conferred no title on the plaintiff, a sub-lessee who was *out of possession*, could not succeed in ejectment against another *sub-lessee* who had the advantage of being *in possession*.⁴ This decision is based on the ground that as the defendant has proved possession he has better title than the plaintiff has.⁵ But it is a matter of doubt whether bare possession is sufficient title against even a trespasser. There has been much divergence of Judicial opinion on this subject. And although this view receives some support from the decisions of Bombay High Court,⁶ the contrary view has been held by the Calcutta High Court in the cases noted below⁷ in which it has been held that mere previous possession does not entitle a plaintiff to a decree for recovery of possession, except in a suit under S. 9 of the Specific Relief Act. This has been pointed out by Mookerjee J. in the case already cited.⁸

¹ e. g. in *Banka v. Raj*—14 C. W. N. 141 :

² *Nazir v. Banshi*—21 C. W. N. clviii following *Ganesh v. Thanda*—23 C. L. J. 539. *Fazal v. Keramuddi*—9 C. W. N. 916.

³ *Bainsab v. Surat*—24 C. L. J. 538 following *Jarip v. Dorfa*—16 C. L. J. 144=2. 17 C. W. N. 59.

⁴ *Telam v. Adu*—17 C. W. N. 59.

⁵ In *Nazir v. Banshi*—21 C. W. N. Clviii the most recent case on the subject, D. Chatterjee and Richardson JJ. point out that the decisions in the cases where the view is taken that the question of the invalidity of the sub-lease granted in contravention of S. 85(1) and (2) can be raised only by the landlord of the raiyat may be explained on the ground that the underraiyyat, in these cases had possession.

⁶ *Pemraj v. Narian*—6 Bom. 215; *Hanmatrao v. Secretary*—25 Bom. 287.; *Narayana v. Dharmachar*—26 Mad. 514.

⁷ *Purneshur v. Brij*—17 Cal. 265; *Shama v. Abdul*—3 C. W. N. 158; *Nisa v. Kanchiram*—26 Cal. 579. But see *Shyama v. Surya*—15 C. W. N. 163 which inclines in favour of the Bombay view.

⁸ *Manik v. Bani*—13 C. L. J. 649.

Where, however, although the under-raiyat was the defendant in possession, it is found that a *notice to quit* under S. 49 (b) B. T. Act had been duly served upon him and he *cannot therefore rely on any subsisting tenancy* no such consideration arises.¹

Thus one is left to make a choice between two distinct classes of cases, one of which places a limited construction on S. 85 and holds it to have been enacted for the *benefit of the superior landlord*, while the other places a wider construction upon the section and allows a *stranger* to avail himself of its provisions to defeat the title of the grantee who had not obtained *possession* before or after the grant. Apart from the conflict on this point, there is no serious doubt as to two propositions, namely, *first*, that the title of the grantee who can fall back upon *prio possession* as tenant or otherwise cannot be defeated by mere proof of contravention of S. 85, and, *secondly*, that, as between the grantor and the grantee, the rule of *Estoppel* applies when the elements essential to attract its operation are proved to exist.²

To get over these difficulties sub-leases are sometimes granted for a period of *nine years with option* on the part of the sub-lessee *to have the lease renewed on the expiry* of the term on the same conditions as before. A lease which creates a tenancy for a term may yet confer on the lessee an option of renewal. A stipulation in a lease executed by a raiyat in favour of an under-raiyat to the effect that after the expiry of the term of nine years for which the lease was granted, the raiyat *would grant* the under-raiyat a fresh lease of land, is valid and is not in contravention of the terms of S. 85 B. T. Act and the under-raiyat could not on expiry of the term be ejected without an offer of a fresh lease on a fair rent.³ When a lease for nine years in favour of an under-raiyat provided that upon the expiry of the term of the *Kabuliati*, a fresh settlement would be made and *till it was made the condition of the Kabuliati would remain in force*. Held—that such a contract of the tenancy between a raiyat and an under-raiyat was valid in law, so far as the contracting parties were concerned.⁴ A *renewal clause* in a lease does not necessarily impart permanency, but the terms of re-settlement must not be *vague*.⁵ Or, in other words, the conditions of re-settlement

Sub-lease for 9 years with lessee's option to have it renewed.

¹ *Nazir v. Banshi*—21 C. W. N. Clviii.

² *Bamandas v. Nilmadhab*—20 C. W. N. 1340=24 C. L. J. 541.

³ *Ali v. Narayan*—15 C. L. J. 122=16 C. W. N. 602.

⁴ *Abdul v. Abdul*—15 C. L. J. 672=16 C. W. N. 618.

⁵ *Secretary v. Forbes*—16 C. L. J. 217.

must be *specific as to the term* of years and the *amount of rent* must be specifically stated. If the conditions of the re-settlement are *specific* as to the term of years and if the rental is specifically stated, the defendant may plead in defence of the suit for ejectment the right to specific performance as against the plaintiffs.¹ Thus where the under-raiyati lease was created for nine years with a stipulation that the *under-raiyat might apply* for re-settlement and thereupon the *raiyat would be bound* to grant a re-settlement. *Held* in a suit by the raiyat for ejectment after the expiry of nine years, that such a plea was inadmissible inasmuch as the terms of the re-settlement were vague. But an *express covenant* to renew in appropriate technical terms is not essential, and the *habendum* may be so framed as to amount in substance to a covenant for even perpetual renewal. If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. If the lease does not state by whom the option is exercisable it is exercisable by the lessee only.²

Position of
under-raiyat
as against
landlord.
(i) When
raiyat's
interest
subsists.

Though void the under-raiyat has a valid title even against the landlord of the raiyat *so long as the interest of the raiyat subsists*, and, if he is *in possession* under a sub-lease granted to him in contravention of the provisions of S. 85 B.T. Act, he *cannot be ejected* by the landlord of the raiyat. For, although the written lease is void under the law, yet, inasmuch as the tenant has been put *in possession* of the land in good faith and as under-raiyat, he cannot be regarded as a trespasser, but must be taken as an under-raiyat, holding otherwise than under a written lease, and as the tenancy is subsisting, he cannot be evicted except by service of notice under S. 49 B. T. Act and he can prove his tenancy right without proving the lease, if he had one, which is inadmissible in evidence for want of registration.³ The landlord has no right to *dispossess* the sublessee, *so long as the raiyat's interest is not put an end to*, and where a sublessee from a raiyat, holding the tenancy from year to year, was *dispossessed* by the landlord of the raiyat, it was held that he could recover possession of the holding from the landlord.⁴ And, if the

¹ *Surendra v. Dina*—13 C. W. N. 595.

² *Secretary v. Forbes*—16 C. L. J. 217.

³ *Fazel v. Keramuddi*—6 C.W.N. 916. See also *Amirulla v. Nazir*—31 Cal. 932=3 C. L. J. 155=34 Cal. 104.

⁴ *Manik v. Bani*—13 C.L.J. 649.

under-raiyat acquires a valid tenancy, it is immaterial whether he is a *plaintiff* in a suit for recovery possession or a *defendant* in a suit resisting eviction.¹ But the contrary was held in a reported case.² And this view has not been accepted also in a very recent case in which it has been held that the landlord can eject the under-raiyat without any notice under S. 49 B.T. Act on the raiyat transferring the holding to the under-raiyat in contravention of S. 85 B. T. Act.³

Where however the raiyats interest does not subsist (ii) When it does not, different considerations arise.

In the case of a purchase by the landlord of the rights of a raiyat by a *conveyance*, it has been held that the landlord cannot *eject* the under-raiyat, without putting an end to the tenancy according to the law. The landlord who acquires the rights of an occupancy-holder under a *private sale* cannot claim any higher right than the occupancy-holder himself had. And, as the raiyat himself, if his interest subsisted, could not eject the under-raiyat without a notice under S. 49 (b) of the Act, the *landlord who steps into his shoes* similarly cannot do so without putting an end to the tenancy.⁴ Besides, the landlord on his purchase is brought into direct contact with the under-raiyat and cannot, in view of S. 22, seek the benefit of S. 85(1) B.T. Act.⁵

But, where the superior landlord purchases the holding at a sale in execution of a decree for *arrears of rent*, it is plain that as the sub-lease of an under-raiyat, who came into the land *in contravention of the statute* without his consent, is *not valid* against the landlord auction-purchaser, it is not necessary for him to annul the interest of the under-raiyat as an *incumbrance* before he can get *Khas* possession.⁶ It is superfluous for him to do so, because as soon as he is brought into direct contact with the subtenant, he is entitled to take up the position that the subtenancy is not binding upon him.³ S. 22 does not stand in the way of his recovering *Khas* possession, because it merely saves the rights of the third persons which are valid as against the landlord.⁶ Where, however, the sub-lease is

¹ *Manik v. Bani*—13 C. L. J. 649.

² *Rangati v. Shyama*—6 C.W.N. 919.

³ *Jadab v. Gobinda*—34 Ind. Cas. 912.

⁴ *Amirullah v. Nazir*—31 Cal. 932=34 Cal. 104=3 C. L. J. 155; *Lal v. Jogu*—13 C. W. N. 913.

⁵ *Ibid* also *Janaki v. Prabhasini*—22 C. L. J. 99=43 Cal. 178=19 C. W. N. 1077.

⁶ *Fakir v. Banamali*—18 C. L. J. 252=19 C. W. N. 412; *Gangadhar v. Rajendra*—17 C. W. N. 860; *Pran v. Mukta*—18 C. L. J. 193; *Gopal v. Ishan*—29 Cal. 148; *Peary v. Badul*—28 Cal. 205.

valid against him and is protected under S. 85 B. T. Act it is an incumbrance which the landlord on his auction-purchase is bound to annul.

(2)
When third
party auction
purchases at
such sale.

The third class of the cases is that of a *stranger* who has purchased at a sale held in execution of a decree for arrears of rent. His rights are clearly regulated by the provisions of Chapter XIV, B. T. Act. The sale having been held under that Chapter must be deemed to authorise the purchaser to annul the subtenancy as one of the incumbrances mentioned in S. 161 and he must take the requisite steps under S. 167 to annul the sub-tenancy. It cannot be contended that as he is a purchaser at the instance of the landlord, he is the landlord within the meaning of S. 85 and that as against him the sub-tenancy is not valid. To give effect to such a contention it would be necessary to read into S. 85 words which do not find a place there. The substance of the argument is a choice between two conflicting positions. One possible view is that as the sub-tenancy is not valid against the landlord when he takes proceedings to enforce the decree for the arrears of rent and brings the holding to sale, he does so on the assumption that the sub-tenancy does not exist; that is, he acts in a manner contrary to the express language, of S. 159. The other possible view is that the landlord acts in conformity with S. 159, and that the property is sold with liberty reserved to the purchaser to annul the sub-tenancy who is required to take the requisite steps under S. 167 for the purpose.¹

Death of
lessor.

A sub-lease created by an occupancy raiyat will enure for the full term of nine years and would not be affected by the death of the lessor in the interval.²

Distrain of
produce.

A landlord is not entitled to distrain the produce of any part of a holding which the tenant has sub-let with his written consent.³ But a landlord is not deemed to have consented to his tenants subletting the holding or any part thereof, merely because he has received an amount deposited by an inferior tenant to obtain the release of property from distrain.⁴ And when land is sub-let in case of any conflict between the rights of a superior and an inferior landlord both of whom distrain the same property, the right of the superior landlord shall prevail.⁵

Janki v. Prabhasini--22 C. L. J. 99=43 Cal. 178=19 C. W. N. 1077.
Finucane and Amir Ali's B. T. Act, 1st Ed. 340.
Act VIII of 1885, S. 121 Proviso 3.
Ibid, S. 136 (5).
Ibid, S. 138.

§ 7. PARTITION OR SUB-DIVISION OF HOLDING.

The B. T. Act lays down that if a raiyat ^{Partition.} with a right of occupancy dies intestate, his right of occupancy will descend in the same manner as other immoveable property ¹. When, therefore, an occupancy raiyat dies leaving *several heirs*, all of them are *jointly entitled* to his right of occupancy. Any property held for the time being *jointly* can be *partitioned* between the joint holders and there is no reason why an occupancy right should be regarded as an exception to the rule. The law of inheritance prevalent in the country, both amongst the Hindus and the Mahomedans, tends to promote the partition and sub-division of tenancies. A suit for partition of an occupancy holding is therefore, maintainable².

But the splitting of an entire holding into several ^{Landlord's} parcels and the distribution of the rent payable in respect ^{consent} thereof tend to diminish the value of the security of the ^{necessary.} landlord for the due realisation of his rent. The landlord is, therefore, entitled to see that the holding which he has let to a tenant is *maintained in fact*. It is his right. In the case of partition the zemindar is not bound to *apportion the rent* payable to him on a division of the holding. He is at liberty to hold the *entire* holding liable for the *entire* rent without reference to the division made amongst the co-sharers; but if he *consents* to the division or distribution of the rent, no body can have any objection and the law will give effect to the same³.

Thus, under the old law, no zemindar or inferior ^{Under} tenant could be required to admit to registry or give ^{Old law.} effect to any division or distribution of the rent payable on account of any such tenure, nor shall any division or distribution of the rent be valid and binding without the *consent* of the landlord⁴.

Similarly the B. T. Act provides:—"A division of a ^{Under B. T.} holding or the distribution of the rent payable in ^{Act.} respect thereof, shall not be binding on the landlord, *unless it is made with his consent*⁵.

¹ Act VIII of 1885, S. 26.

² *Rajendra v. Satish*—15 Ind. Cas. 331 (an Allahabad case)

³ Finucane—Amir Ali's B. T. Act, 1st Ed. 357.

⁴ Act X of 1859, S. 27 *Proviso*=Act VIII of 1869 B. C. S. 26

⁵ Act VIII of 1885 S. 88.

Under old law consent express or implied.

Under the old law the *zemindar* might recognise the division of the holding either formally by *actually dividing* it into separate parts or *impliedly* by receiving rents from the parties holding separately,¹ and no *written consent* was necessary when he had himself put up a holding for sale in separate lots and had taken rent from the purchasers separately².

Under original B. T. Act written consent.

It may be implied.

The original B. T. Act laid down that the *consent* of the landlord *in writing* was necessary in order to make the subdivision binding on him³. The law did not require any *express* consent and where the consent might be *implied* from his conduct and other circumstances of the case it was held to be sufficient. And, where it was clear from the *conduct* of the landlord or his authorised agent that the division of the holding had been acquiesced in or *consented* to, the law would not require the consent to be formulated in writing in terms. The consent was to be gathered from all the circumstances.⁴ Thus where a receipt for rent was granted by the landlord or his agent, in the form prescribed by B. T. Act containing a recital that a tenant's name was registered in the landlord's *sherista* as a tenant of a portion of the original holding at a rent which was a portion of the original rent, it amounted to a consent in writing by the landlord to a division of the holding and to a distribution of the rent payable in respect thereof within the meaning of S. 88 of the Act, provided that if the receipt had been granted by an agent, he had been duly authorised by landlord to grant such a receipt⁴. It was to set at rest doubts raised by this ruling that a new provision has been added to the section by the B. T. Amending Act⁵.

Under Amendment express consent of landlord or his duly authorised agent.

The original B. T. Act laid down that *consent* of the landlord was necessary in order to make the subdivision of the holding binding on him. Subsequently the law was amended and, at present, the landlord is only bound by an *express consent in writing* given by *himself* or by a *duly authorised agent*.⁶ In the report of the Select Committee on the Bill it was pointed out that "unless

¹ *Uma v. Rajlakhi*—25 W. R. 19.

² *Gour v. Anand*—22 W. R. 295.

³ Act VIII of 1885, S. 88.

⁴ *Peari v. Gopal*—25 Cal. 531=2 C. W. N. 375 distinguishing *Abhoy v. Sashi*—16 Cal. 155.

⁵ Rampini's B. T. Act, 4th Ed. Notes to S. 88, footnote at 283.

⁶ Act VIII of 1885 as amended by Act I. of 1907 B. C.

their agents are authorised in that behalf it would be unfair to the landlords and detrimental to their interest. A wide door would be opened to fraud and it would be easy for the tenants to secure recognition by bribes to the agents. It is therefore provided that there must be an *express authorisation for the exercise of this power by the agent*¹.

The ordinary practice for the landlord to signify his consent to the division of a holding and the distribution of the rent payable is by making the necessary *alteration in the rent roll* and it is accordingly provided by the Amendment that where such an alteration has been made it may be *presumed that the landlord has given his express consent* in writing to such division or distribution².

Alteration of rent roll—presumption of consent.

These amendments have been omitted from the Act passed by the late East Bengal and Assam Legislative Council as it was there apprehended that its inevitable result would be to cause wide-spread and grave injustice. There the landlords are for the most part absentees, and the tenant deals with the local agent and is accustomed to regard him as fully empowered in all particulars and has no opportunity of procuring the inspection, and cannot understand the contents, of the agent's power of attorney. No landlord will in fact give his local agent the required authority. The tenants, moreover, will not in practice be able to produce the roll and discover the necessary entry, while the landlord will not find it difficult to rebut the presumption. A tenant who pays to the agent the customary *salami* in good faith to secure recognition, may, after many years, find himself to be cheated, and where fraudulent collusion between tenant and agent is found to exist, no court would hold that the tenant's receipt was to be taken as the landlord's assent.³

Law different in East Bengal and Assam.

The consent referred to in this section must be the consent of the *whole body* of landlords. *Co-sharer* landlords cannot consent to the division of the holding or to the distribution of its rent.⁴

Consent of whole body of landlords.

The existence of a custom in a particular district by which rights of occupancy in such district are transferable,

Partition of holding and transfer

¹ Report of the Select Committee on the Bill to amend B. T. Act.

² Report of Select Committee on the Bill to amend B. T. Act and Act VIII of 1885, S. 88 as amended.

³ Report of the Select Committee for Act I of 1907 East Bengal and Assam.

⁴ Unreported case quoted in Rampini 4th Ed., 284: Finucane and Amir Ali, 1st Ed., 360.

of different
portions to
different
persons.

will not justify the holder of such a right of occupancy in subdividing his holding and transferring different parts of it to different persons. For the transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of S. 88 B. T. Act and the existence of such a custom is immaterial and gives no right to the transferee as against the landlord. The landlord is not bound to recognise a splitting up of the holding and is entitled to recover his rent from the transferer and the transferee.¹ The transferee of a part of the holding is jointly liable with his co-sharer for the whole rent; for, although the privity between the parties may be one of the estate only, it is in respect of the whole of the holding, though the transfer was of a part, by reason of the indivisibility of the holding without the landlord's consent.²

Partition
how to be
effected.

A suit for partition of an occupancy holding is maintainable. But the division, unless made with the landlord's consent, will not be binding upon him. In such a case the court need not subdivide the holding in contravention of the provisions of the Tenancy Act, but it can either give the occupancy holding to one party taking from that party an equivalent in value, or, if it be found impossible to do this, the court can leave the occupancy holding undivided, merely making a declaration that the parties are entitled jointly to the holding.³

Partition
between
co-sharer
landlords.

Where a *sole* proprietor acquires the half share of land held jointly by two occupancy raiyats by a transfer from one of them, the right of the other co-sharer to obtain a partition against the landlord is saved by the provisions S. 22 of B. T. Act.⁴

Necessity of
raiya's con-
sent.

While the law debarred the tenants from splitting up their holdings without the consent of the landlord, the latter too are precluded from breaking up existing holdings and redistributing the lands, so as to alter the nature and extent of the holdings, without the consent of the raiyats.⁵

Partition
among land-
lords binding
on raiyat.

But on the partition among the landlords themselves, the entire holding is split up and each co-sharer is entitled to consider the land allotted to him on partition as a distinct holding. The rent is thus split up and by such partition

¹ *Tirthanand v. Mati*—3 Cal. 774; *Kuldip v. Gillanders*—26 Cal. 615 = 4 C. W. N. 738; *Beni v. Madhusudan*—8 C. L. J. 2n. *Bandez v. Kedarnath*—11 C. W. N. cxliv.

² *Jogemaya v. Girindra*—4 C. W. N. 590.

³ *Dwarka v. Rampat*—36 All. 461.

⁴ *Bandez v. Kedarnath*—11 C. W. N. cxliv.

⁵ *Ruheemuddy v. Poorno*—22 W. R. 336.

one single holding may be converted into a number of separate holdings. Thus a *partition among the landlords* is binding on the tenants but the converse is not the case.¹ The B. T. Act, while it requires the consent of the landlord to be necessary in order to make the sub-division of the tenancy binding on him, does not require the consent of the tenant in case of a division of the holding by the landlord himself.

¹ Mitra's Tagore Law Lectures on *The Land Law of Bengal* 203.

§ 8. RIGHT TO SURRENDER.

Right to
Surrender.

The right of *surrender* or relinquishment is a privilege given to tenants, by means of which they may retract the lease and establish their tenure upon a new basis or may extinguish the lease altogether.¹ This right is also another incident of occupancy right,² which the law has specially protected, and any *contract taking away* the right is *invalid* in law.³ The power, however, must be exercised subject to the conditions laid down.

Contract in
bar void.

Conditions.

The B. T. Act has effected several important changes in the law relating to this right. It lays down that "a raiyat not bound by a lease or other instrument for a *fixed period*" may surrender his holding "at the end of the agricultural year." But it is proper that he should give the landlord *notice* of his intention.⁴ This was also the rule under the old law. According to it the raiyat was bound to give notice *in writing* of his intention to surrender. A *verbal* notice was, accordingly, held to be insufficient.⁵ Under the present law it has been held that the notice need *not* be *in writing* and that there may be a valid surrender without a written document.⁶

Notice.

Written or
Oral.

Service of

The raiyat has the option of causing the notice "to be served through the civil court within the jurisdiction of which the holding or any portion of it is situate."⁷

Time of

Under the old law the notice was to be given, in places where the *Fasli* year prevails, in or before the month of *Jeyt*, and in places where the Bengali year prevails in or before the month of *Pous*, of the year preceding that in which the relinquishment was to have effect.⁸ Instead of a varying rule regarding the time when the notice should be served, the present law enacts that the raiyat should "give the landlord at least *three months* before he surrenders notice of his intention to surrender."⁹

Presumption
of notice.

The present law provides certain *presumption* in favour of the fact that the notice was given to the landlord. Such a presumption is raised from the fact of the raiyat's

¹ *Ram v. Ranigunoe*—26 Cal. 29 P. C. = 2 C. W. N. 697.

² Act VIII of 1869 B. C. S. 20 = Act VIII of 1885, S. 86.

³ Act VIII of 1885, S. 178 (3) (c).

⁴ Act VIII of 1885, S. 86.

⁵ *Bonomali v. Debi*—24 W. R. 118.

⁶ *Khondkar v. Ali*—5 C. W. N. 351 = 28 Cal. 256; See also *Imambandi Kamleswari*—14 Cal. 109 = 13 M. I. A. 160.

⁷ Act VIII of 1885, S. 86 (4).

⁸ Act VIII of 1869 B. C. S. 20.

⁹ Act VIII of 1885 B. S. 86.

taking new holding in the same village or from his leaving the village altogether—important provisions the absence of which caused serious hardship under the old law. Besides, the fact that the landlord lets the land to other persons would be evidence of a knowledge on his part of the raiyat's intention to surrender.¹ Under the old Act it was held that such letting would *absolve the raiyat* from the liability to pay rent, although he might not have given actual notice of relinquishment.² It would *a fortiori* be so under the present law. Where no notice has been given and the elements which give rise to the statutory presumption are wanting and the defence is based on the allegation that the landlord has taken possession of the land or let it to others, the *onus* is on the raiyat.³

Notice of surrender is required only *during the continu-* Notice when
ance of the tenancy. required.

Under the old law, if a raiyat failed to give the notice and the land was not let to any other person, he *continued* Raiyat's
to be *liable for the rent* of the land.⁴ Evidently his liability liability to
continued until the land was let.⁵ Under the present law rent when no
if the raiyat fails to notify his intention to surrender at least notice given.
three months before he actually surrenders, he is liable to indemnify the landlord against any loss of the rent of the holding for the agricultural year next following the date of surrender.⁶

The *heirs* of an occupancy raiyat dying intestate are liable to pay rent, whether they occupy the land or not, unless they surrender the holding or do something from which a surrender in the terms of the section may be presumed, and mere *non-cultivation* of land does not necessarily amount to a surrender.⁷ Surrender by
heirs.

Difficult questions often arise as to how far a surrender by a person who is entitled to a holding *jointly* with others Surrender by
affects his co-sharers. Under the old law it was held that, co-raiyat.
where a member of a joint family was registered as *jotedar* in the zemindar's *Sherista*, *not for himself only but as manager (karta) for the family*, his relinquishment of the

¹ Act VIII of 1885, S. 86 (3).

² *Mahomed v. Sankar*—11 W. R. 63.

³ *Erskine v. Ram*—8 W. R. 221.

⁴ Act VIII of 1869 B. C. S. 20.

⁵ *Finucane and Amir Ali's B. T. Act* 1st Ed., 347.

⁶ Act VIII of 1885, S. 86 (2).

⁷ *Peari v. Kumaris*—19 Cal. 790.

holding was not sufficient to authorise the Zemindar to treat it as a surrender by all and to make a settlement of the land with others.¹ In such a case the surrender must be held to have been made on his own behalf and not on behalf of the family. This principle will clearly apply under the present Act. But a relinquishment by *one* of several joint tenants of an occupancy holding of his *fractional* interest to the landlord is valid to that extent and does not *enlarge* the *right of the* other *non-surrendering* co-sharers so as to entitle them to claim the share relinquished by the other co-sharers or deprive the land-lord of what would ordinarily belong to him.²

Surrender of
part of
holding.

The surrender must be of the *entire* holding. We know of no law or custom by which a raiyat is justified in throwing up a portion of his *jote* and keeping just that portion which happens to suit his convenience and which may be * * * * the very portion which confers value on the remainder of the *jote* and one without which no fresh tenant will be found to enter on an engagement. He may either retain the whole or throw up the whole in conformity with the provisions of the law. He cannot surrender a *part* and retain a *part*. This is clear from the wording of the law and is in accordance with old rulings.³ But there is nothing which prevents a landlord from *accepting* the surrender of a part of a holding and in that case he is entitled to re-enter that portion, but how far any subordinate rights which the raiyat may have created upon that portion is affected thereby is not quite clear as will appear from what is stated below.

Effect on
incumbrances
created by
raiya.

The principle of English law is that a lessee can only give title to his lessor by a *surrender* to the same extent that he can give it to another person by an *assignment*; or in other words, he has no power to effect by *surrender* anything that he cannot do by *assignment* to a third person; the reason being that he cannot convey to his landlord, any more than to any one else, anything that he has not got himself.⁴

When
binding on
andlord.

Therefore the landlord, taking the tenant's right (by *surrender*), should equitably be bound by his previous transaction (*e.g.* by way of mortgage), that is to say, as a tenant cannot

¹ *Baikanta v. Bissonath*—9 W. R. 268.

² *Peari v. Radhika*—8 C. W. N. 315—5 C. L. J. 9; *Kedar v. Baikunta*—15 C. W. N. 680.

³ *Sarada v. Hasi*—5 W. R. (Act X) 78. *Anarulla v. Koylash*—8 Cal. 118. But *contra* in *Habila v. Durga*—11 W. R. 456.

⁴ *Raghunath v. William*—19 C. W. N. 268.

derrogate against his own grant, so the landlord who took the tenant's right could not do so, though it may be open to him to assert his superior right as landlord otherwise than by accepting a surrender from his tenant¹

The B. T. Act embodies this principle within certain limits. It provides that "when a holding is subject to an incumbrance secured by a registered instrument, the surrender shall not be valid unless made with the consent of the landlord."² That is to say, no incumbrance shall hold good against the landlord on a surrender of the holding, unless it is registered. When the interests of an incumbrancer are not secured by a registered instrument, the incumbrance is of no avail against the landlord.

The validity of the incumbrance is limited to the position of the transferor (tenant) and the transferee, i.e. it must be one which is binding between the tenant and incumbrancer and not one which is binding on the landlord.³ The landlord's right, therefore, cannot be affected by an incumbrance which is not legally binding upon him.

To guard against surrender on the part of the raiyat in fraud of the rights of third parties in collusion with the landlord, it has been provided that even when an incumbrance is registered no surrender shall be valid unless it is made with the consent of the incumbrancer.⁴

The word "incumbrance" has not been explained in that section but it has been defined elsewhere as meaning "any lien, sub-tenancy, easement, or other right or interest created by the tenant on his tenure or holding in limitation of his own interest therein."⁵ And that definition, though given there for a particular purpose, may be accepted for the purposes of this section as well, though the contrary view appears to have been taken in the cases noted below.⁶

From this it is clear that a mortgage or a sublease by a raiyat on his holding is an incumbrance within the meaning of the section and is protected. Thus where there is a registered mortgage over a portion of a holding, the holding cannot be surrendered without the

Collusive
Surrender.

On mortgage.

¹ *Mahammad v. Isab*—21 C. L. J. 185. But contra per Coxe J. in *Hasani v. Sadir*—30 Ind Cas 252.

² Act VIII of 1885, S. 86 (6).

³ *Mahammad v. Isab*—21 C. L. J. 185.

⁴ See 1 above.

⁵ Act VIII of 1885, S. 161.

⁶ *Tomesuddin v. Khodu*—11 C.L.J. 162=14 O.W.N. 229: *Askar v. Gopi*—18 C.L.J. 257: *Zamir v. Blaeswari*—25 C.L.J. 480.

consent of the mortgagee, so as to defeat his right, and the surrender in such a case does not entitle the landlord to eject the mortgagee (if he is in possession of the holding.) When an *entire* holding is mortgaged by a registered document, a *portion* of it cannot be surrendered without the consent of the mortgagee so as to defeat his right.¹

On statutory
lien.

The *statutory lien* created by S. 171 B. T. Act in favour of a person, who has in a holding, advertised for sale in execution of a decree for arrears of rent, an interest which will be voidable upon the sale, for the amount paid by him in order to prevent the sale, though not a registered incumbrance, has the effect of postponing the *Khas* possession of it by the landlord on a surrender by the raiyat, till the lien is satisfied.²

On Sub-
leases.

So far as *sub-leases* are concerned, on a surrender of the holding the landlord can re-enter by ejecting the under-raiyat without a notice to quit if his interest is not protected by S. 85 or 86 (b) B. T. Act. That is to say, a sub-lease created with the consent of the landlord or by a registered document for a term not exceeding nine years shall hold good against the landlord, but not a sub-lease created without his consent or for a period over nine years even though by a registered document, and in such a case the landlord is entitled to eject the sub-lessee and no notice to quit would be necessary. And the same principle applies whether the surrender is of the whole or a part of the holding.³

On Transfer.

The cases where a raiyat, after transferring a portion to a third party surrenders the whole, or the remaining, or even the transferred portion, of his holding to the landlord, have given rise to much difference in judicial opinion. It will be dealt with in detail hereafter.

¹ *Rayhunath v. Cox*—19 C. W. N. 268.

² *Nabadwip v. Bhairab*—13 C. W. N. 97.

³ *Gobinda v. Udoy*—15 Ind. Cas. 264.

§ 9. RIGHT TO ABANDON.

The cultivation of the land and the payment of rent are two of the important incidents of a raiyati tenancy; and when the raiyat does neither, and, without giving notice to the landlord, departs from the land he has occupied—that is evidence of his severing his connection with it so as to justify the landlord in re-entering. Although there was no statutory provision, under the old law it was so held in several cases.¹

Abandonment.

The B. T. Act lays down rules regarding the subject.

What amounts to an *abandonment* is a question of fact and must depend upon the special circumstances of each case. But the Legislature has laid down three distinctive conditions as guiding principles for the decision of the question, *namely*, that the raiyat (a) has voluntarily *abandoned his residence*, (b) that he has done so *without due notice to the landlord* and also *without arranging for the payment of his rent as it falls due*, and finally (c) that he *has ceased to cultivate* his holding either by himself or by some other person. When these conditions concur the landlord can treat the holding as abandoned on following the procedure laid down by law.² The Act does not purport to define an *abandonment* or to give an exhaustive description of the acts which constitute it. Certain acts are recited which may, but do not necessarily, amount to an *abandonment*, and it is possible to contemplate a case in which a raiyat who has committed all these acts, may still be able to persuade the Court that he has not voluntarily abandoned his holding, notwithstanding that the landlord has, after notice duly entered under this section.³ *Partial or temporary non-cultivation* is no evidence of abandonment.⁴ Nor is mere *omission to pay rent*.⁵ Mere non-payment of rent by an occupancy raiyat does not extinguish the tenancy and constitute an abandonment.⁶ But the fact that the tenant has *ceased to cultivate the lands coupled with the non-payment of rent* is evidence upon which the Court may come to the conclusion that there has been an abandonment.⁶ In the case, however, of a *homestead* land, cultivation is

What amounts to

¹ Finucane—Amir Ali's B.T. Act, 1st Ed. 351.

² Act VIII of 1885, S. 87; *Madan v. Mahima*—33 Cal. 531=3 C. L. J. 343; *Ram v. Jawahir*—12 C. W. N. 879=7 C. L. J. 72. *Monohar v. Ananta*—17 C. W. N. 82.

³ *Lal v. Arbulla*—1 C. W. N. 198;

⁴ *Radha v. Kali*—18 W. R. 41.

⁵ *Masyatulla v. Nurjahan*—9 Cal. 808=12 C. L. R. 389.

Obhoy v. Koilash—14 Cal. 757; *Nilmoni v. Sonatan*—15 Cal. 17.

unnecessary and the only test, therefore, of an abandonment within the meaning of the B. T. Act, would be *discontinuance of residence* in the village where it is situate.¹ But it has been pointed out that S. 87 contemplates a case in which there is *cultivation* of the holding by the raiyat and consequently a holding consisting of land *partly horticultural and partly homestead* does not strictly come within its purvie.² When a tenancy in favour of several tenants has not been split up, and even one of the original tenants still remains on the land though the others drop away, there is no abandonment within the meaning of S. 87 B. T. Act.³ We shall elsewhere deal with the circumstances under which the *transfer* of a non-transferable occupancy holding amounts to an abandonment thereof.

Landlord's
right of
re-entry.

The landlord may, at any time after the expiration of the agricultural year in which the raiyat abandons his holding, enter on it and let it to another tenant or take it into cultivation himself.⁴

Notice by
landlord.

But before doing so he is required to file a *notice* in the prescribed form in the Collector's Office, stating that he has treated the holding as abandoned and is about to enter it accordingly.⁴ These steps are required to be taken by the landlord for his own protection against any subsequent action on the part of the tenant when there is no person in actual occupation of the land, but when the old tenant has abandoned the holding, a person, who has admittedly acquired no interest, (*e.g.*, a transferee from the raiyat or an auction-purchaser of it) has no title to remain on the land on the ground of the landlord not having taken the steps provided under this section.⁵

Its effect.

The notice is important for the purpose of the *suit* which the tenant is allowed to bring under Cl. 3 but is not essential to make an abandonment complete and effectual; and a landlord, who has not given such notice, is still at liberty to prove that abandonment has in fact taken place⁶. The service of notice is not indispensable to effect a legal abandonment and to allow a valid re-entry. Its only effect is to make it obligatory on the tenant to have a speedy determination of the question whether there has been an abandonment or not.⁷

¹ *Raghubar v. Ram*—36 Ind. Cas. 530 (Pat).

² *Bepin v. Sashi*—9 Ind. Cas. 20.

³ *Gopi v. Haladhar*—30 Ind. cas 583.

⁴ Act VIII of 1885, S. 87 (1)—(2).

⁵ *Bhagoban v. Bisseswari*—3 C. W. N. 493.

⁶ *Kamala v. Bijoy*—15 Ind. cas 639.

⁷ *Ram v. Jawahir*—12 C. W. N. 879=7 C. L. J. 72.

S. 87 of the B. T. Act does not legalise an entry by the landlord, if as a matter of fact the holding has *not been abandoned*. It is not the service of notice which terminates the tenancy, but rather the voluntary abandonment by the tenant, coupled with acts on the part of the landlord (not necessarily limited to the giving of notice) indicating that he considers the tenancy at an end. The landlord who proceeds under S. 87 takes possession at his own risk and on his own responsibility. But if he adopts the procedure laid down in S. 87 he safe-guards himself to this extent that it becomes obligatory on the tenant to have a speedy determination of the question whether there has been an abandonment or not.¹

These provisions apply only to a case in which a landlord takes possession of an abandoned holding without bringing a suit. They are not exhaustive and are not applicable to cases in which a landlord *sues for possession* of a holding on the ground that it has been abandoned. The landlord may proceed by suit if he can prove that the facts and circumstances of the case lead to an inference of abandonment. Thus where the occupancy raiyat after executing a *zuripeshgi* lease directed the lessee to pay the rent and himself left the village. *Held*—that there was such abandonment as entitled the landlord to sue the tenant and his lessee for ejectment.²

Provision has been made for the protection of the sub-lessee of a raiyat who has abandoned the holding. But all sub-leases which are *valid against the raiyat* himself are not saved, but only those which are *binding against the landlord* and of which the term has not expired and that only for the unexpired term. The landlord can enter on the holding in the case of abandonment, even if there are sub-lessees, the only exception being made in favour of a sub-lease executed by a *registered* instrument the term of which is still *unexpired*. In such a case, the landlord must first offer the land to the sub-lessee, for the remainder of the term of the sub-lease, at the rent paid by the raiyat who has ceased to cultivate the holding, and on condition of the sub-lessee paying up all arrears due from the raiyat. The continuance of the sub-lease is, therefore, dependent on two conditions:—(a) that the sub-lessee agrees to pay the rent which the raiyat who has abandoned the holding had to

¹ *Sures v. Nesa*—11 C. L. J. 433.

² *Samujan v. Mahaton*—4 C. W. N. 493 approved of in *Rajani v. Ekkari*—7 C. L. J. 78—11 C. W. N. 811—34 Cal. 689.

pay, and (b) that he pays up all the arrears due from the raiyat. If he refuses or neglects within a reasonable time to accept the offer, the landlord may enter on the holding and let it to another tenant or cultivate it himself. The time for the acceptance of the offer must be reasonable.¹ The entry must be in accordance with the law; for even where the raiyat has abandoned the holding the landlord has no right to enter upon the land, if in possession of a sub-lessee, without the assistance of law.² If he so dispossesses the sub-lessee without the sanction of law he commits trespass.³

Distinction
between
surrender
and aban-
donment.

The position of a landlord in the case of an *abandonment* is stronger than that in the case of a *surrender* by a raiyat. In the case of an *abandonment*, the landlord does not acquire any *title through the raiyat* as in the case of a purchase. In the case of a non-transferable occupancy holding where the *raiyyat* sells the holding and quits possession of the lands (*i.e.* *abandons* the holding), the lands become part of the *Khas* lands of the landlord, and the holding does not continue to exist in such a case apart from the right of occupancy itself.⁴ Where a sub-lease by a raiyat is not binding on the landlord and the holding does not subsist after abandonment, an under-raiyat does not become a raiyat. In the case of a *surrender*, the landlord taking the tenant's right should equitably be bound by his previous transaction, that is to say, if a tenant could not derogate against his own grant, so the landlord who took the tenant's right could not do so, though it may be open to him to assert his superior right as landlord otherwise than by accepting a surrender from his tenant. In such a case therefore, the landlord is bound by a mortgage (or a sub-lease) by the tenant,⁵ (provided of course in the case of a sub-lease it is valid under S. 85 B. T. Act). A raiyat, therefore, is not entitled to relinquish the holding in favour of the landlord after having mortgaged or sub-let it so as to affect the interests of the mortgagee or sub-lessee.

Raiyat's
right of
return.

The status of a settled raiyat once acquired is not lost by mere abandonment of the holding and removal from the village, unless the absence from the village last for more than a year. So that if a settled raiyat, who has given up his holding and removed to another locality, *returns*

¹ Finucane and Amir Ali's B.T. Act, 1st Ed., 356; S. 87 (4) Act VIII of 1885.

² *Jamir v. Gonai*—12 W.R. 110.

³ *Damri v. Bissessar*—13 W. R. 291.

⁴ *Pran v. Mukta*—18 C.L.J. 193.

⁵ *Mahammad v. Isab*—21 C.L.J. 185.

to the village within the space of one year and takes up another holding although under a different landlord, he would not lose his status.¹

An occupancy raiyat has two years from the date of the publication of notice, within which he may institute a suit for recovery of possession of the land.² In such a case the court has to be satisfied that he did not "voluntarily abandon" his holding. The main issue in such a case is whether the abandonment was voluntary or not, though of course the question relating to the character of eviction *i.e.* whether it is *wrongful* or not, may incidentally form the subject of the enquiry.³ If, as a matter of fact, there has been no abandonment, the tenant may also bring a suit for recovery of possession under S. 9 of the Specific Relief Act within six months of the dispossession and the mere fact that the landlord has taken proceedings under S. 87 does not make his entry one "in due course of law," so as to bar such a suit.⁴ When the raiyat recovers possession of the land in these ways, he is deemed to have *continued to be a settled raiyat*, notwithstanding his having been out of possession more than a year.⁵

An abandoned holding does not become the "proprietor's private land," but still remains part of the *raiya* stock of the village⁶ in which the right of occupancy may accrue in the ordinary way.

Suit by raiyat to recover possession.

Abandoned land does not become proprietors private land.

¹ Act VIII of 1885, S. 20 (6), 86 and 87.

² Act VIII of 1885, S. 87(3); *Bhagabati v. Lutan*—7 C.W.N. 218.

³ *Amir Ali and Finucane's B.T. Act*, 2nd Ed., 236.

⁴ *Suresh v. Nesa*—11 C.L.J. 433.

⁵ Act VIII of 1885, S. 20(6).

⁶ See (3) above, 396.

S.10 RIGHT TO TRANSFER.

(i) *Right not ordinarily transferable except by custom or usage.*

Transfer of
occupancy
right.

The right of the occupancy raiyat to transfer his holding has been traced in the *Introduction*. To put the matter very briefly, under the old law, occupancy rights were not transferable against the will of the landlord *save by custom not mere usage*. The custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord; of course, when holdings were put up to sale in execution of decrees at the instance of the landlord as decree-holder, the transfer so effected was presumed to be made with his consent, but when the sales were in execution of decrees of third parties, the right of transfer was disputed. A transfer, therefore, whether by a voluntary sale or gift, or by a sale in execution of a decree was not sustainable, in the absence of a clear and well-defined custom to that effect, and, when a raiyat sold his holding, the right of occupancy ceased and he could not protect his purchaser from ejectment. If the transfer was by execution-sale, the auction-purchaser acquired no right of occupancy where the right was not dependent upon custom, but is a mere creature of the Rent Law¹.

Old law.

Under
B.T. Act—
transferable
by custom
or usage.

Although occupancy rights are expressly made heritable by the provisions of the B.T. Act "subject to any custom to the contrary," it contains no provisions as to the transferability or non-transferability of occupancy rights. Instead of legislating it and regulating it the Act has left it everywhere to custom. For the whole Act is *subject to "custom, usage and customary right,"* except so far as they are consistent with or expressly or by necessary implication abolished by its provisions². A *usage* under which a raiyat is entitled to sell his holding without the consent of his landlord, is not inconsistent with, and is not, expressly or by necessary implication, modified or abolished by the provisions of this Act. The usage, accordingly, wherever it may exist, will not be affected by this Act³. Moreover, nothing contained in any contract made between a landlord

¹ Finucane & Amir Ali's B. T. Act, 1st Ed. 153—154.

² Act VIII of the 1885, S 183.

³ *Ibid*, Illustration 1.

and a tenant after the passing of this Act, shall take away the right of a raiyat to transfer his holding in accordance with local usage¹. The *right* therefore, *in so far as it is merely statutory, is not transferable*. The raiyat cannot transfer it by sale, gift, mortgage, or exchange, nor is the right saleable in execution of a decree against him. But custom or local usage may make the right transferable, and when it is so, the transfer may take place by the voluntary action of the raiyat or may be affected by the various modes of involuntary alienation².

The Bengal Tenancy Act has not defined the terms *usage*,³ "usage" and "*local usage*" or explained within what period they may be established. The words '*custom*' and '*usage*' are not synonymous terms and the same kind of evidence as would be required to prove a '*custom*' is not necessary when the existence of a '*local usage*' is in question. A *usage* may grow up and be formed (comparatively speaking) in a much shorter period than custom which must be in existence from time immemorial in order to be recognised. As observed by their Lordships:—"We feel bound to say that there is a great difference between a '*custom*' and a '*usage*,' and that clearly the latter may be established in a much *less* period of time than a custom of the transferability of occupancy holdings. We are not prepared to say how long a period must elapse before such a usage can grow up, but we may say that, seeing that more than twelve years have elapsed since the passing of the Tenancy Act, we do not think it is right to say that no *new usage* can have *grown up since* that time."³ From these observations it would seem that the word '*usage*' in Sections 183 of the B.T. Act may include what the people have been for a few years past in the habit of doing in a particular place. It may be that this particular habit is only of a very *recent origin* or it may be one which has existed for a long time. If it be one which is *regularly and ordinarily practised* by the inhabitants of a place where the tenure exists, there would be *usage* within the meaning of that section.⁴

The Calcutta High Court in a case observed that it was *Need not* material to find whether such usage was *in existence at the exist*

¹ Ibid, S 178 (3) (d).

² Saroda Mitra's *Land Law of Bengal*, 299—300.

³ *Dalgliesh v. Guzafer*—23 Cal. 425=3 C. W. N. 21. *Saritulla v. Prannath*—26 Cal. 134.

⁴ Roy's Tagore Law Lectures on *Customs and Customary Law in British India*, 518 and 3 above.

but may grow up after creation of holding. time of *the creation of the tenure*.¹ "It is submitted however, that the validity of a usage does not depend upon the fact of its existence at the time of the creation of the holding or tenure. The tenure may have been created a long while ago but the custom or usage may have grown up since. Nor is there anything in the law to prevent such growth."²

Need not exist at time of B.T. Act but may subsequently grow up. The usage to which Sections 178 and 183 refer is not restricted to usage existing *at the time of the Act*, but includes usage which may have *subsequently grown up*.³ For usage does not need the antiquity, the uniformity, or the notoriety of custom and it is enough if it appears to be so *well-known and acquiesced in* that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract.⁴

Meaning of 'local.' The term "*local*" is frequently applied to an area smaller than an entire estate or country as a whole and is comprehensive enough to include an entire district.⁵ In every district of Bengal, there is a different custom and the question (whether the holding is transferable by custom or not) can only be decided by reference to *local custom*. What is the custom in Lower Bengal is not so in the Eastern and the Northern parts, and *vice versa*. In some parts, the *Khind Kasht* tenants are allowed to sell without reference to their landlord; in other parts, the practice has not been allowed; and the only method by which the question in each case can be decided, is by reference to *local custom*.⁶, *i.e.* properly speaking, *local usage*.

How it grows up and affects preexisting as well as subsequent tenancies. No doubt, as pointed out by Mookerjee J:—"The principle upon which contractual obligations are allowed to be modified by custom or usage is that such custom or usage may enter into the body of a contract without being expressly inserted, *as both parties are supposed to know it and to intend to be bound by it*. But although this may be the theory upon which usages and customs are treated as incorporated into contracts, it does not necessarily

¹ *Dinonath v. Nobin*—6 C. W. N. 181.

² *Amir Ali and Finucane's B. T. Act*, 1st Ed. 624. See also *Basul v. Satis*—15 C. W. N. 732=13 C.L.J. 418.

³ *Dalglish v. Guzaffar*—23 Cal. 425=3 C.W.N. 21 *Sariatulla v. Prannath*—26 Cal. 134.

⁴ *Joga v. Manik*—4 W.R. P. C. 8=7 M.I.A. 212. *Palakdhari v. Mannars*, —23 Cal. 179. *Dalglish v. Guzaffar*—23 Cal. 427=3 C.W.N. 21.

⁵ *Brajendra v. Khalil*,—21 C.L.J. 489.

⁶ *Joykishen v. Rajkishen*—1 W.R. 153.

follow that usage may not grow up so as to affect pre-existing contracts or incidents of tenancies under the Bengal Tenancy Act. It will be observed that in the case of the usages of transferability of holdings, they can grow up only by the acquiescence, in the first instance, of the landlord himself; they are at first matters of choice with him but may acquire an obligatory element or binding force after he has acquiesced in the conduct of his tenant for a sufficient length of time."¹ When, therefore, a landlord acquiesces in a certain course of conduct by his tenants, (for instance, transfers by them of their holdings) and such acquiescence has led to the growth of a custom or usage (on an estate) which is binding upon him, the position of the parties is the same as if the landlord had expressly granted to them a right to (transfer their holdings.)² In this view, it may rightly be held that a usage of transferability, after it has grown up, affects not merely tenancies created there-after but also existing tenancies. When a landlord has allowed a usage of transferability to grow up in his estate, the benefit of it attaches to existing tenancies and is also incorporated into subsequent contracts of tenancy.¹ When, therefore, tenants, who have originally no right (to transfer their holdings), are allowed to do so, and this course of dealing is acquiesced in for a length of time and in numerous instances so as ultimately to entitle the tenants to a customary right (of transfer of their holdings) *tacitly incorporated into their contracts*, the result is a substantial encroachment upon the rights of the landlord (who is thereby compelled to recognise the transfers).²

The essence of a custom or usage of transferability is *its essence: that transfers made with the knowledge but without the consent of the landlord, are valid and must be recognised by him.*³ The usage or custom must be *obligatory*; otherwise it cannot be said to have acquired the imperative character of law.¹

A growing usage of transferability of occupancy holdings *Effect of growing usage.* s, on the same principle, of no effect against the landlord. The usage to be effective must have *gr wn up and fructuated*

¹ *Buzlul v. Satis*—13 O. L. J. 418 = 15 C. W. N. 752. See *Palak-hari v. Mannars*—23 Cal. 179, applying *Jagmohan v. Manick*—7 M. I. A. 683.

² *Prodyot v. Gopi*—11 C. L. J. 209 = 14 C. W. N. 487. which, though deals with the growth of custom entitling tenant to appropriate trees ut down the principle laid down may very well apply to the case of custom of transfer of occupancy right.

³ *Jagun v. Posun*—8 C. W. N. 172, *fd. in Peary v. Jots*—11 C. W. N. 83.

Landlord
can retard its
growth.

into maturity¹. When the usage of transferability of occupancy holdings is proved to have been growing up in *pattis*, other than that of a particular landlord, the latter can retard the growth of the usage in his *patti*, which is a separate estate, by refusing to acknowledge the validity of transfer in his *patti*².

Custom.

Custom, as used in the sense of a rule which, in a particular district, has, from long usage, obtained the force of law must be—(a) ancient, (b) continued, unaltered, uninterrupted, uniform, constant (c) peaceable and acquiesced in, (d) reasonable, (e) certain and definite, (f) compulsory and not optional to every person to follow or not and, (g) must not be immoral.³

Onus and
proof of
transferabi-
lity.

An occupancy right is presumably not transferable and the *onus* of proving its transferability is on the person who alleges it to be transferable; in other words, the burden of proving the custom or usage by which it is transferable is on the person who sets it up.⁴ Thus, where a decree-holder for money wants to sell an occupancy holding belonging to his judgment-debtor in execution of his decree, the *onus* of proof is on him to establish that the holding is transferable by custom or local usage.⁵ If the usage of transferability is set up, it is necessary to prove its *existence on the estate* of the landlord, or that it is so prevalent in the neighbourhood that it can be reasonably presumed to exist on that estate. It may be that the usage may have sprung up *all round* an estate *yet has never been introduced into it* or recognised on it; and, therefore, in considering the evidence, it is of much importance that this should be taken into consideration in connection with the conduct of the landlord in regard to any such transfer as may have taken place without his consent. Thus, where the only evidence is that such usage has grown up in other *pattis* in a village, but that the landlord of a particular *patti* has always refused to acknowledge the validity of transfers in his *patti*: *Held* that no right of transferability by custom can be said to have arisen in respect of that *patti*.⁶ If the holdings in *other villages of the same pargana* are held

¹ *Ramhari v. Jabar*—6 C. W. N. 861. *Rajendra v. Chandra*—12 C. W. N. 878.

² *Jagun v. Posun*—8 C. W. N. 172. *Peary v. Jote*—11 C. W. N. 83.

³ *Woodroffe v. Amir Ali's Indian Evidence Act*, 4th Ed.

⁴ *Kripa v. Durga*—15 Cal. 89 : *Madhu v. Kamini*—9 C. W. N. 895 = 32 Cal. 1023. But see *Daya v. Ananda*,—14 Cal. 382.

⁵ *Nur v. Chandra*—23 Ind. cas. 939,

⁶ *Palakdhari v. Manners*—23 Cal. 179.

under the same conditions and are in other respects like the village in respect of which the question is raised, the usage of transferability in such other villages would be relevant to the enquiry and a judgment in which that question was decided would be admissible in evidence.¹ The statements of persons who are in a position to know of its existence in their locality are admissible as evidence of it². But it is not sufficient to shew that such holdings are sold in the village or neighbouring villages. Mere instances of transfer are not enough³. It is very difficult to say that any number of instances of sale with the consent of the landlord can possibly prove usage of sale without such consent⁴. And the mere finding of a Court that tenants do transfer their rights of occupancy without the landlord's consent does not itself establish a usage affecting the right of the landlord to accept, or refuse to consent to, such transfer⁵.

There may be a custom that a landlord recognizes transferees on payment of *Nazar*. In order to prove a custom or usage of transferability, what is necessary to prove is that such transfers have been made to the knowledge and without the consent of the landlord, and that they have been recognised by him either without the payment of *Nazar* or upon payment of a *Nazar* also fixed by custom.⁶ Where there is such custom a raiyat is entitled to sell his holding without reference to the landlord and the transferee acquires a title on payment of *Nazar*. The non-payment of such fee (or *Nazar*) renders the transfer invalid and the landlord is entitled to eject the transferee. In order to prove such a custom it is not sufficient to prove that tenants do transfer their rights of occupancy without the landlord's consent⁷. Unless the *Nazar* is also fixed by custom the landlord is not bound to recognise a transfer upon payment of *naza*.⁸ Where the facts found as to the local usage of transfer of a non-transferable holding are that the transferror's name is entered into the

Transfer subject to payment of *Nazar*.

¹ *Dalgliesh v. Guzaffar*—23 Cal. 427=3 C. W. N. 21.

² *Sariatulla v. Prannath*—26 Cal. 184.

³ *Peari v. Jote*—11 C. W. N. 83.

⁴ *Kailash v. Hari*—13 C. W. N. 541.

⁵ *Radha v. Ananda*—8 C. W. N. 235 ; *Sibo v. Raj*—8 C. W. N. 214
Dino v. Nabin—6 C. W. N. 181.

⁶ *Bazlal v. Satis*—13 C. L. J. 410=15 C. W. N. 751 Where all previous cases are cited.

⁷ *Radha v. Ananda*—8 C. W. N. 135 ; *Sibo v. Raj*—8 C. W. N. 114.

Kailash v. Hari—13 C. W. N. 541, But see *Kurani v. Sajone*—C. W. N. 539.

⁸ *Sheikh v. Ramani*—17 C. W. N. 1105.

books of the landlord only on payment of *Nazar* to the landlord, *Held*: that the transfer may be without the consent of or reference to the landlord, but the *payment of Nazar is essential to validate it*¹. When the landlord receives *Nazarana* as a condition of recognising a transfer, the acceptance of such *nazarana* shows that he consents to the transfer². But when it is found that *nazars* as a rule are paid to the Zemindar and that on the payment of the *nazar* the purchaser is *usually* recognised by the landlord: *Held* that this is not evidence of any custom or usage by which an unwilling landlord is bound or evidence that the landlord is compelled to recognise the purchaser on payment of *Nazar* whether he wishes to do so or not³. As has been said before, the usage or custom must be *obligatory*; otherwise it cannot be said to have acquired the imperative character of law. But it is not necessary to prove that the *landlord* has actually *made an objection* to transfers and has been unsuccessful.⁴

(ii) *Transfer where right transferable.*

Formality
of transfer
when right
transferable.

A transfer of an occupancy holding in accordance with custom or local usage is valid even without the consent of the landlord⁵. An occupancy holding is tangible immovable property and when the occupancy right is transferable by custom its sale or transfer can be effected, if its worth is rupees 100 and upwards, by a registered deed of sale, or if worthless than rupees 100 by a registered deed of sale or by delivery of the property⁶.

Recognition
of transferee
by landlord.

Whenever the custom or usage of transferability is proved to exist, the *landlord is bound to recognise* the transferee on his obtaining possession, and wherever the B. T. Act prevails, as soon as notice of the transfer is given to the landlord⁷. For the landlord ought to know who is the person in actual occupation as raiyat; and the raiyat who has sold his holding ought to be freed from liability for rent after the cessation of his interest, and the transferee should have the advantage of having notices of suits for arrears of rent⁸. Registration of his name

¹ *Radhu v. Ananda*—8 C.W.N. 235; *Sibo v. Raj*—8 C.W.N. 214.

² *Kailash v. Hari*—13 C.W.N. 541; *Kumari v. Sajoni*—12 C.W.N. 539.

³ *Bhagirathi v. Sital*—16 C. W. N. 955.

⁴ *Baslal v. Satis*—13 C. L. J. 418 *Ramhari v. Jabher*—6 C. W. N. 861 *Jagan v. Posun*—8 C. W. N. 172 *Rajendra v. Chandra*—11 C.W.N. 878.

⁵ *Palakdhary v. Manners*—23 Cal. 180.

⁶ Transfer of property Act IV of 1882, S 54.

⁷ Act VIII of 1885, S 73.

⁸ *Saroda Mitra's Land Law of Bengal*, 341.

in the landlord's *sherista*, by striking off his transferror's name is not necessary in the same way as in the case of tenures. The landlord's recognition of the sale must follow the alienation and consequent possession without payment of any 'fee' or any other action on the part of the raiyat or his alienee, except the service of a notice of the transfer upon the landlord¹. It is open to the transferee to sue to obtain a declaration that he has acquired certain rights under the Specific Relief Act². But a suit to have it declared that the old tenant is no longer responsible for the rent and that the transferee is so responsible to the landlord does not lie without service of notice prescribed by Sec. 73 B.T. Act³.

When an occupancy raiyat transfers his holding (which is transferable by local usage) without the consent of the landlord, the *transferror and the transferee shall be jointly and severally liable* to the landlord for arrears of rent accruing due after the transfer, unless and until the notice of the transfer is given to the landlord in the prescribed manner⁴. The notice of transfer is thus essentially necessary to relieve the outgoing tenant, and it would seem that until that notice is served in accordance with the rules prescribed by Local Government in that behalf, the landlord is not bound to recognise the purchaser as his tenant and any action against the original tenant will bind the purchaser notwithstanding that he is not party to it. The due service of notice on the landlord operates as registration in the landlord's office, and no suit for registration is therefore, necessary.⁵ It was held by a Full Bench under the former law that when a landlord had received rent from the transferee and was fully aware of the transfer of a holding which was by custom transferable without the consent of the landlord, the transferror's connection with the holding had come to an end and a suit against him for rent did not lie⁶. The same would seem to be the case under the present law.

Notice of transfer to landlord.

unless given both transferror and transferee jointly and severally liable for rent

The raiyat has no right to *split* up his holding without the consent of the landlord. The transfer of a *portion* of an occupancy holding is contrary to the spirit, if not to the letter (of Section 88) of the B. T. Act, and the existence of a custom in a particular district by which rights of occupancy

Transfer piecemeal.

¹ Act VIII of 1885, S 73.

² Act I. of 1877, S 42.

³ *Ambika v Keshri*—24 Cal. 642.

⁴ Act VIII of 1885, S 73.

⁵ *Ambika v. Keshri*—24 Cal. 642.

⁶ *Abdul v. Ahmed*—14 Cal 795.

in such district are transferable, will not justify the holder of such a right of occupancy in subdividing his tenure and transferring different parts of it to different persons; and in case of such transfer the Zeminder is entitled to treat the transferees as trespassers and eject them¹. But where the vendor of the plaintiff is not the sole owner, the transfer in his favour, if operative at all, operated to the extent of his share. Where, therefore, lands transferred to the plaintiff did not constitute an entire holding but formed only a part thereof, it is not competent to the landlord to recognise the plaintiff to the detriment of the defendant who subsequently purchased from the co-sharer of the plaintiff's vendor his share of the land. If the entire holding had been abandoned the position of the parties might have been different².

(iii) *Can non-transferable right be transferred?*

(1) *Voluntarily* :—A. TO LANDLORD.

Voluntary
transfer to
landlord.

From what has already been stated it is clear that an occupancy right which is not ordinarily transferable can be transferred validly to a landlord, that is to say, to a 16 annas landlord. He himself can purchase or take mortgage of a non-transferable holding of his tenant and where such a holding is mortgaged to him, and he assigned the mortgage to a purchaser of the holding, *Held* that the landlord was *estopped* from denying that the purchaser had acquired a valid title.³ But a *co-sharer* landlord in this respect holds the same position as a stranger purchaser.⁴ The effect is the same where the sale is compulsory in execution of a decree order or for arrears of rent or for money.

B. TO THIRD PARTY.

Voluntary
transfer to
3rd party.

There was a considerable conflict of judicial opinion upon the point whether a right of occupancy which is not transferable by custom or local usage is a right that is *merely personal to the raayat* and as such cannot be transferred at all, or is a right the transfer of which is valid against all persons other than the landlord, so that no one except the landlord can take exception to the validity of

¹ *Kuldip v Gillanders*—26 Cal 615=4 C.W.N. 783 :

Trithanand v Mutty—3 Cal 174 followed in

Fairuddin v Tara—19 C. W.N. clvi.

² *Samo V Muhammad*—19 C.L.J. 462.

³ *Mahesh v. Muharor*—17 C.W.N. 70.

⁴ *Deosaran v. Buteswar*—23 C.L.J. 559.

the purchaser's title—in other words, whether the validity of the transfer can be questioned by any person other than the landlord of the holding. In a certain case Jenkins C. J. pointed out:—"The question involved has been somewhat obscured in more recent times, and it will therefore be convenient to look into its history."¹ We have already dealt with the state of things that existed previous and subsequent to the Rent Act of 1859, when it was authoritatively held by the Privy Council that a right of occupancy can not be transferred². "Subsequent to the passing of the Bengal Tenancy Act, the learned judges after a consideration of its provisions, came to the same conclusion and held that the tenant whose occupancy holding had been sold in execution of a money decree, could *himself raise the question* that the holding was not transferable in a suit by a purchaser for possession of the holding and that the tenant was not barred by the provisions of S 244 C. P. C. '82 (=S 47 C. P. C., '08).³ The same principle was followed in a number of cases where such a question was raised by the tenant, with this qualification that if the tenant was *aware* of the execution proceedings and, having had opportunity of objecting, *did not object*, he was precluded by the provisions of S 224 C. P. C. '82 (=S 47 C. P. C. '08) from raising the question subsequently.⁴ In a recent case, a suit for possession by the purchaser of a share of an occupancy holding was resisted not by the tenant who has transferred his share, but by his *co-sharers*, and it was held that it was open to tenants in occupation of a portion of the *jote* i.e., the *co-sharers* of the vendor to question the validity of the transfer.¹ In this connexion it is instructive to note the view expressed in certain cases that even if the Zemindar consented to the transfer, the transferee would thereby merely acquire a new *jote* on the same terms as the original tenancy was held.⁵ A different view has been taken in other cases *viz.* that the question of transferability is one that might be raised by the landlord but can not legitimately be raised by trespassers, and that whatever might be the precise nature of the tenant's interest which is purchased, it has a market value and the transfer is capable of being recognised by the landlord, and that the purchaser is entitled to be protected in the enjoyment of his purchase against all

Conflict of decisions.

¹ *Agarjan v. Panaulla*—12 C.L.J. 169=37 Cal. 687.

² *Chandrabati v. Harrington*—18 Cal. 349 P.C.

³ *Bhiram v. Gopi*—24 Cal. 355.

⁴ *Eg. Durga v. Kali*—26 Cal. 727.

⁵ *Tara v. Surja*—15 W. R. 152 : *Hyder v. Bhubendra*—17 W. R. 179.

later departure from earlier decision in favour of transfer.

the world except possibly his landlord,¹ or, in other words, the transfer of an occupancy holding is not a void transaction and is *voidable* only at the option of the landlord.² And in several cases it has been held that in a suit between *two rival claimants* (both of whom derive their title from the tenant), neither of whom is the original tenant nor the landlord, the question of transferability does not arise³. These cases also can be explained by the doctrine of *Estoppel*. A sale of occupancy holding has been held to be valid if settlement is made by the landlord with the auction-purchaser as soon as can be reasonably expected after the sale⁴, and an objection to the sale of a holding with the consent of some of the landlords was over-ruled on the ground that the non-consenting landlords might give their consent after the sale is held, but that the decree-holder might take the risk and the purchaser must purchase at his peril⁵. In the case of a *voluntary* transfer it has been held that the transferor cannot question the validity of his own transfer⁶, but such cases proceed on the ground not that the transfer is valid but because the doctrine of *Estoppel* stands in his way. If the view that the transfer of an occupancy holding is valid against all persons excepting the landlord is correct, it is difficult to see how the raiyat himself whose right is sold at an execution sale can question the validity of the purchaser's title, or why the validity of the transfer should depend upon recognition by the landlord in cases where the landlord does not impugn the transfer. If, on the other hand, occupancy holdings are not transferable at all, there does not seem to be any reason why persons who are the co-sharers of the transferor tenant or even trespassers in the possession of the land should not be entitled to question the validity of the transfer, or why the purchaser should acquire a right of occupancy by consent of the landlord although he might by virtue of fresh settlement become a non-occupancy raiyat⁷.

Recognition of transfer to limited extent.

From the above review of the case-laws it appears that there had been a radical conflict of judicial opinions regarding the transferability of occupancy rights. As pointed out by the recent Full Bench :—"The later decisions mark a departure from the earlier judicial pronouncements and the

¹ *Basarat v. Sabullah*—2 C. W. N., COLXXIX.

² *Hari v. Uday*—8 C. L. J. 261=12 C. W. N., 1086.

³ e. g. *Ayenuddin v. Srish*—11 C.W.N. 76 see also *Ambika v. Aditya*—6 C.W.N. 624.

⁴ *Dwarka v. Tarini*—34 Cal. 199.

⁵ *Shaharuddin v. Himangini*—16 C.W.N. 420.

⁶ See *Bhagiratha v. Hafizuddin*—4 C.W.N. 679.

⁷ *Dayamayi's case*, Judgment of referring Judges.

opinions of those who have studied this question in the past. The life of the law, however, it has been said, is not logic but experience, and the modern departure is probably due to a change in economic conditions which has brought into prominence problems that did not previously call for solution"¹. Having regard to the conflict of views noticed above the Full Bench to which the question was referred after a mature and careful consideration and "on a recognition of the paramount importance of upholding decisions on which dealings with property have been expressively based" came to the following conclusions :—(a) That a right of occupancy which is not transferable by custom or local usage is a right which can be transferred, but the holding apart from the right cannot be transferred: (b) that the transfer of the whole or a part is operative as against the raiyat, (i) where it is made voluntarily, (ii) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside. A sale is made involuntarily where it is in execution of a money decree, but not of a decree founded on a mortgage or charge voluntarily made; (c) that the transfer of the whole or a part is operative as against all persons other than the landlord and the raiyat where it is operative against the raiyat; (d) that the transfer is operative as against the landlord, wherever it is operative as against the raiyat, provided the landlord has given his consent, express or implied, to the transfer¹.

(2) Involuntarily :—A. IN EXECUTION OF MONEY DECREE.

It was sometimes contended that, though there might be no custom or usage under which occupancy rights were transferable, they might yet pass in execution sales and that such transfers, though not valid against the landlord, would yet be valid against the former tenant. This however does not appear to be the law². For there is no ground for distinguishing a voluntary sale from a sale in execution, and if a sale by private contract would not validly pass it, then a sale in execution would not equally pass it, and vice versa³. As pointed out by N. Chatterjee J. in a recent case :—"The recent Full Bench * * have laid down that an involuntary transfer i.e. a sale in execution of a money decree, (and not of a

Sale in execution of money decree :—
(ii) Of third party.

¹ *Dayamayi v. Ananda*—20 C. L. J. 52 F. B.=18 C.W. N. 971 F. B.

² *Rampini's B. T. Act*, 4th Ed., 122.

³ *Dwarka v. Harish*—4 Cal. 925,

decree founded on a mortgage or charge voluntarily made) of the whole or part of an occupancy holding, apart from custom or local usage, is *operative against the raiyat*, where the raiyat with knowledge fails or omits to have the sale set aside.¹

Where raiyat consents or with knowledge does not object. It is true the questions whether a raiyat is entitled to have the sale set aside or has the right to object to the sale before it takes place, were not in terms decided by the Full Bench. But if the raiyat has no right to object to the sale of an occupancy holding in execution of a money decree before it takes place or has no right to have the sale (after it takes place) set aside, in other words, where the sale is *valid* (i.e., e.g. where the holding is transferable or where the raiyat himself has mortgaged it), the sale would be *operative* against him, and it would be immaterial whether he had knowledge of the sale or omitted or failed to have it set aside. The sale however, though *invalid*, (i.e., e.g. where the holding is not transferable &c.) may be operative against the raiyat, if he *with knowledge* thereof omits or fails to have it set aside. The question therefore of the omission or failure to set aside the sale with knowledge thereof, becomes material only where the sale is *invalid* and the raiyat has a right to object to it. * * The Full Bench decision, therefore, by implication holds that the raiyat is entitled to have a sale of the holding in execution of a money decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the raiyat objects to the sale before it takes place.”***²

Knowledge where immaterial.

Where material

Where raiyat objects.

Sale invalid even though landlord consents. Even in a case where the decree-holder obtains the consent of the landlord to the attachment and sale of the holding, but the judgment-debtor (the raiyat) objects thereto on the ground that it is not transferable, his Lordship has been pleased to point out that:—“as the raiyat cannot confer a title upon the purchaser without the consent of the landlord, so the landlord alone, by his own act and without the concurrence of the raiyat, cannot create a title in the purchaser. The two must concur in order that the transfer may be valid. Having regard to the view taken by the F. B. as to the involuntary transfer, we are unable to hold that the entire holding or a part of it can be sold in execution of a money decree if the raiyat objects to the sale even if the landlord give his consent to such sale.”³

Holding not attachable in execution. In the earlier case his Lordship has further pointed out that “Under Section 60 C. P. C. '08 all saleable property

¹ *Dayamoyi v. Ananda*—20 C. L. J., 52 F. B.=18 C. W. N. 971. F. B.

² *Badrannessa v. Alam*—21 C. L. J. 650=19 C.W.N. 814.

³ *Narayani v. Nabin*—25 C. L. J. 351=21 C. W. N. 400.

belonging to the judgment-debtor or over which he has a *disposing power* which he may exercise for his own benefit, is liable to sale in execution of a money-decree. But a *non-transferable occupancy holding is not saleable property*, and the Full Bench decision does not hold that the raiyat has a disposing power over the holding. All that it holds is that a voluntary transfer is *operative* against him."¹

In the case just referred to¹ the occupancy holding was put up to auction in execution of a money decree *at the instance of a third party*. But the right of a *sixteen-annas landlord holding a money decree* against one of his own raiyats to put up for sale in execution that raiyat's occupancy holding not transferable by usage, was questioned in a very recent case before the Patna High Court and reliance was placed on that case. Sharfuddin and Roe JJ. of that court observed:—"The whole current of case-law is against the sale in execution of an occupancy right without the consent of the landlord. It must be conceded that without the consent of the landlord an occupancy right is ordinarily not a saleable right. In the case noted below² it was *assumed* that the landlord cannot, against the wishes of the tenant, make this right saleable. On this *assumption* the rule propounded in [some of the earlier cases] is overridden. In the first of these cases³ the decision was ultimately based on the fact that the raiyat had failed to come in under S. 244 (C. P. C. '82), and in the other⁴ it is said: 'In any case the decree-holder takes the risk and in the present, state of the law the purchaser will purchase at his peril,' These two decisions can hardly be taken as decisive. [But] the decision in another case⁵ is decisive. So also is that in the case [just referred to²] To get at the root of the matter it is necessary to enquire into the origin and nature of the occupancy right. [That enquiry has been made by Jenkins C. J. of the Calcutta High Court in the the case noted below.⁶] The basis of all authoritative statements on the subject is that the right of occupancy is a right *personal to the particular raiyat*.⁶ A personal right is *not a saleable right*. Occupancy rights may by usage become transferable. But here there is *mutuality*. The raiyats as a body

Sale in execution of a money decree of (ii) 16 Annas landlord.

¹ *Badarennessa v. Alam*—21 C. L. J. 650. also 2 below.

² *Narayani v. Nabin*—25 C. L. J. 351 = 21 C. W. N. 400.

³ *Dwarka v. Tarini*—34 Cal. 199.

⁴ *Shakaruddin v. Hemangini*—16 C. W. N. 420.

⁵ *Annada v. Ratnakar*—7 C. W. N. 572.

⁶ *Agarjan v. Panavilla*—37 Cal 687 (691)

Sale invalid
if raiyat
objects.

desire a conversion of the personal nature of the right. The *landlord acquiesces* in that desire. Before the nature of the occupancy right can be changed landlord and raiyat must concur. This was the *ratio decidendi* in the most recent decision of the Calcutta High Court.¹] The power of voluntary transfer is the measure of the power of involuntary alienation². The landlord cannot extend that power without the consent of the tenant. And on these grounds their Lordships the objection of the raiyat.³ It may be permissible to point out, with due deference to their Lordships that, in the opinion of N. Chatterjee J. of the Calcutta High Court, the position that "the landlord cannot, against the wishes of the tenant, make this right saleable" follows logically from the same F. B. decision regarding the involuntary sale of the right and not a mere *assumption* of their Lordships of the Calcutta High Court in the case already referred to¹ as their Lordships of the Patna High Court seem to have supposed.

Setting aside
Sale.

Further, it follows from the F. B. decision as explained by the two later decisions already discussed that *after* the sale has been held, if the raiyat having no knowledge thereof (or of the proceedings leading thereto), applies to have the sale set aside, the *sale cannot be confirmed*, even though the decree-holder or the auction-purchaser *obtains the landlord's consent prior to the sale or secures a recognition of the purchase from him subsequent thereto*.⁴ But the sale can be held if the raiyat knowingly does not object; and after confirmation of the sale the raiyat cannot raise the objection at all.

After
confirmation.

Therefore, in the absence of custom or local usage to the contrary, a *raiya* holding in which a raiyat has only a right of occupancy is not saleable at the instance of any creditor of his other than the landlord seeking to obtain satisfaction of his decree for arrears of rent.⁵ But where the raiyat with full knowledge of the execution proceedings and the sale had failed to raise the objection at the time of the sale that the holding was

By 16 As.
landlord.

¹ *Narayani v. Nabin*—25 C. L. J. 351=21 C. W. N. 400.

² *Agarjan v. Panavalla*—37 Cal. 687 (691.)

³ *Mac Pherson v. Debeebhushan*—2 F. L. J. 530. The report in wrong.

⁴ *Badarannessa v. Alam*—21 C. L. J. 650, (652).
= 19 C. W. N. 814.

⁵ *Bhiram v. Gopi*—24 Cal. 355=1 C. W. N. 396; *Peari v. Jati*—11 C. W. N. 83.

not transferable and the question was raised after the sale had been confirmed and after the purchase had been recognised by the landlord, it was held that the sale was valid.¹ This however does not apply to a sale held in execution of a decree founded to a mortgage or charge voluntarily made by the raiyat in which case the transfer, though involuntary, is operative against the raiyat.²

The F. B. has made no distinction between the involuntary sale of the *whole* and a *part* of the holding and the principles deducible from its decision is applicable to both.³ But not co-sharers.

But with all respect to their Lordships it may be permissible to point out that the aforesaid Full Bench have gone further and definitely held that "a right of occupancy, which is not transferable by custom or local usage *can be transferred*," though "the holding apart from a right of occupancy cannot be transferred"³, or, in other words, a holding with the right of occupancy attached to it *can be transferred*. Where the transfer is *voluntary*, the Full Bench have laid down that "it is *operative against the raiyat*". As explained by Mookerjee J, in a very recent case:—"the decision of the F. B. shows abundantly that in cases of transfer for value *title unquestionably passes from the transferor to the transferee*, even though there is no recognition by the landlord" and "although the validity of the transfer is liable to the question by the landlord who is no party to the transaction, in other words, a *transfer* of this description *can not be impeached by the transferor* though the landlord may possibly refuse to recognise of the transfer."⁴ If that is so, it follows that the raiyat has "*disposing power* which he may exercise for his own benefit" over the holding. In view of F. B. decision holding should hold saleable and attachable in execution.

A non-transferable occupancy holding should, therefore, be held liable to be *attached*, and sold in execution of a money-decree against the raiyat. Further, it may be observed that in view of the Full Bench decision it cannot now be rightly contended that the right of occupancy is a *right personal to the particular raiyat* and that therefore a holding in which the raiyat has a right of occupancy is absolutely un-saleable. It is *saleable* in one or other of the circumstances already mentioned, and I have just shewn that the raiyat has the disposing power over his hold-

¹ Dwarkanath v. Tarini—34 Cal. 199=5 C.L.J. 289.=11 C.W.N. 513.

² Dayamayi's F. B. case—above: also Sadavi v. Palaknath—1 P. L. J. 257.

³ Vide Judgment of the referring Judges in Ambika v. Ram—20 C. L. J. at pp. 84-85 and the F. B. decision in Dayamayi's case para. III.—Ibid., 90.

⁴ Beharilal v. Sindhubala—22 C. W. N. 210.

Knowledge
or consent
of raiyat
should be held
unnecessary
where
landlord
consents.

Prior or
subsequent
to sale.

ing. As explained in the case noted below:—"the only person concerned in the transfer of a tenant's holding is naturally the landlord. If he consents to the transfer made by the tenant, there is an end of the matter¹. "The tenant in this case is the judgment-debtor; he is bound to pay his debt; and if the landlord, who is the only other party interested in impugning the validity of the sale of the holding in the occupancy of the tenant, consents to it, there is no reason why it should be open to the tenant to object to the sale"². The Legislature has declared in the B. T. Act that such a holding may be brought to sale in execution of a decree for rent obtained by the landlord, that is to say, the whole body of landlords; and it has always been understood that if a raiyat sells his holding *with the consent of the landlord* the sale becomes effectual. It seems, therefore, that in principle there is no difference between the case of a voluntary sale made by the raiyat himself and an *involuntary sale held by the court* if such sale is *consented to by the landlord*. The reservation, therefore, made by the Full Bench in favour of the raiyat [*viz* that in order to be operative against him it is necessary that "the raiyat with knowledge fails or omits to have the sale set aside"³] ought not to apply to such a case⁴. *i.e.* where the landlord gives his consent. Before the F. B. decision it was held that a sale in execution of a money decree of an occupancy holding is valid and effectual if the *sale is held with the consent of the landlord*⁵. Even a share of a holding could be sold with the consent of the co-sharer landlords to the extent of their shares. Thus in a case in which the co-sharer landlords to the extent of a 15 annas share consented to the sale, the High Court maintained an order passed by the court below granting the decree-holder's application for sale of an occupancy holding to the extent of that share observing that "the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the risk and in the present state of the law the purchaser will purchase at his peril"⁶. And it was not thought necessary that the *consent* of the landlord should be obtained *prior to the sale* and the sale was held to be valid if the landlord subsequently to the

¹ Palakdhari v. Manners—23 Cal. 179.

² Dwarka v. Hurrish—4 Cal. 925 (928); Ananda v. Ratnakar—7 C. W. N. 572.

³ Dayamayi's case—20 C. L. J. 52 F. B., &c.

⁴ The F. B. in Dayamayi's case has definitely stated where the transfer by a raiyat is operative against the landlord.

⁵ Ananda v. Ratnakar—7 C. W. N. 572.

⁶ Shakaruddin v. Hemangini—16 C. W. N. 513.

sale recognised the purchaser and received rent from him¹ But N. Chatterjee J. in a still later case observes :—"The view taken in those cases can no longer be maintained having regard to the decision of the F. B. which, as stated above, impliedly laid down that an occupancy holding cannot be sold in execution of a money decree if the tenant objects to the sale."²

B. IN EXECUTION OF DECREE ARREARS OF RENT.

Sale in
Execution of
rent decree.

But though an occupancy right not transferable by custom or usage is not saleable in execution of a money decree at the instance of a third party, the Legislature has declared in the Bengal Tenancy Act that such a right may be brought to sale in execution of a decree for arrears of rent obtained by the landlord³, that is to say, the *whole body of landlords*.⁴ But it cannot be sold in execution of a decree obtained by a *co-sharer* landlord for *his share* of the rent⁵, even though it is *separately payable* to him, and in this respect a co-sharer landlord is in the same position as an ordinary execution-creditor⁶.

(iv) *Effect of Transfer when right not transferable As against land-lord.*

The effect of the transfer by a raiyat of a non-transferable occupancy right as against the land-lord has been thus stated by Sir Richard Couch, C. J. in a Full Bench case :—"If a raiyat having a right of occupancy endeavours to transfer it to another person, and in fact, quits his occupation and ceases himself to cultivate or hold the land, it appears to me that he may be rightly *considered to have abandoned his right*, and that nothing is left in him which would prevent the *zamindar* from *recovering possession* from the person who claims under the transfer. And not only may he be considered to have abandoned it, but if the right which is given by law is one which exists only so long as he holds or cultivates the land, when he ceases to do that by

Effect of
transfer
when right
not transfer-
able as
against
landlord.

Right of
landlord to
khas
possession.

¹ *Dwarka v. Tarini*—34 Cal. 199=5 C. L. J. 294=11 C. W. N. 513.

² *Narayani v. Nabin*—36 Ind. Cas. (Cal.)=25 C. L. J. 351=21 C. W. N. 400.

³ *Durga v. Kali*—26 Cal. 727: *Sadagar v. Krishna*—3 C. W. N. 742: *Jarip v. Ram*—3 C. W. N. 747: *Sita v. Atmaram*—4 C. W. N. 571: *Badarannessa v. Alam*—21 C. L. J. 650=19 C. W. N. 814.

⁴ *Shakaruddin v. Hemangini*—16 C. W. N. 420.

⁵ *Badarannessa v. Alam*—21 C. L. J., 650=19 C. W. N. 814.

selling his supposed right and putting another in his place, *his right is gone* and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the raiyat is invalid, and gives the transferee no right to possession, but the raiyat could not recover possession from the transferee as he would be bound by his act of transfer; nor could the landlord recover possession because the outstanding right in the raiyat would be in his way. The result would be that although the transfer is invalid, the transferee would be able to keep possession and to set the landlord at defiance."¹ The decision of the Full Bench case was thus explained in a later case:—"In that (F.B.) case it was ruled that the transferee of occupant rights, illegally sold, could be ejected if he had entered into actual possession of the land. The principle involved in that case was the *abandonment by the tenant of his connection with the land, and the landlord's consequent right to re-enter*"². It is evident that it is essential to such a case that the raiyat must have abandoned it *altogether*². These were a cases under the Rent Act of 1869 but the principle applies to cases under the B.T. Act. What is relied on by Sir Richard Couch in his judgment is, that when the tenant *quits the land and ceases himself to cultivate or to hold the land*, he abandons thereby the right of occupancy. Now, if we read the words of the learned Chief Justice along with Section 87 of the B.T. Act, there can be no doubt that in order to entitle the landlord to re-enter on abandonment by the tenant it must "be abandonment in the words of Section 87, *namely*, that the raiyat voluntarily abandons his residence without notice to his landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate". In such a case only the landlord's entry would be legal and he may then let the land to another tenant or take it into cultivation himself³.

Effect same
as abandon-
ment by
tenant.

What is
abandonment

It has been pointed out by the recent Full Bench decision in the *Dayamayi's* case that *what is abandonment or relinquishment depends on the substantial effect of what has been done in each case*. Where the transfer of the *whole* holding has been made and the substantial effect of what has been done appears to be that the purchase has deprived the landlord of the tenant to whom alone he could look for his rent

¹ *Narendra v. Ishan*—22 W. R. 22 F. B.=13 B.L.R. 274.

² *Brishtee v. Madun*—9 Cal. 648.

³ *Kabil v. Chandra*—20 Cal. 590; *Nadhu v. Kartik*—9 C.W.N. 56.

and for the proper cultivation of. his holding, and it is not known who the purchaser may be or whether he is in any way a proper person to cultivate his land and it does not appear that any rent has been paid since the purchase, at any rate that it has been paid to the landlord, there is certainly such an abandonment or relinquishment in fact as would entitle the landlord to eject the transferee¹. It is not necessary to prove as a fact that the raiyat has *left the holding and disclaims any interest in it*. It is a direct inference from the fact that possession was given to the transferee and it is not necessary to prove *distinct repudiation or refusal to pay rent*.² In the case of *homestead* land cultivation is unnecessary and the only test of its abandonment is the *discontinuance of residence in the village*.³

Transfer may be by way of *sale*, either of the *whole* or *part* of the holding, or by way of *mortgage*, with or without *possession* thereof, or by way of *sub-lease* or *gift*. And the validity of the transaction, whatever may be its nature, depends upon the question whether there has been an *abandonment* of the holding in the sense above explained on the part of the tenant.

Transfer when amounts to abandonment

Thus the *sale* of a raiyati holding not transferable by custom, does not by itself entail a forfeiture of the tenancy. If the original tenant *continues on the land and does not repudiate his obligation to pay rent to the landlord*, the latter, (in the absence of a clause in the lease providing for forfeiture and re-entry in the event of an unauthorised transfer) cannot treat the tenant as a trespasser and sue him in ejectment.⁴ It is only when the *transfer is followed by abandonment* of his holding by the tenant that the landlord, as in any other case of abandonment, may enter into possession and he may then disregard the transferee, who *ex-hypothesi*, has no title by his purchase, and who, if he resists, may also be ejected.⁵ If, on the other hand, the transaction of *sale is not meant to be operative* and the title to the property still continues in the tenant and the transferee holds it on his behalf (*i.e.* where it is a *Benami* transaction) he cannot be evicted.⁵

Sale of entire holding.

¹ *Aminunnessa v. Jemait*—20 C.L.J. 584=19 C.W.N. 43.

² *Chand v. Romoni*—17 C.W.N. 1105.

³ *Raghubar v. Ram*—36 Ind. Cas. 653.

⁴ *Denonath v. Krishna*—9 C.W.N. 379. *Madan v. Mahima*, 3 C.L.J. 343=33 Cal. 331. *Dwarkan v. Harish*—4 Cal. 925. *Bhupendra v. Bunsu*—40 Cal. 870.

⁵ *Narendra v. Johan*—22 W. R. 22.

⁶ *Mathuru v. Ganga*—10 C.W.N. 1033=33 Cal. 1219.

Sale of part. A sale of a *portion* of an occupancy holding does not cause a forfeiture of the tenancy. This is settled by a long series of decisions¹ and is now finally confirmed by the recent Full Bench decision.² Notwithstanding the purchase of a portion of the holding, the *tenancy*, so far as the landlord is concerned, *continues* unaffected, and he is entitled to look for the payment of rent to his recorded tenant.³ The purchaser is entitled to possession even as against the landlord, in as much as the tenancy is not determined and interposes a barrier between him and the landlord.⁴ But a sale by a tenant of an *entire separated holding* constitutes abandonment.⁵

Tenant still on land:—
(a) As sub-lessee under purchaser of whole.

When the *tenant*, after the sale of his holding, continues *in possession* (of the whole) as a *subtenant* of the purchaser, wholly repudiating his relationship with his former landlord and ceasing to pay rent to him, the act of the tenant has been construed, not unreasonably, as an abandonment and the above consequences have been held to follow.⁶ But when the tenant, notwithstanding that he had sold the holding and taken a sub-lease from the transferee, insisted, when the landlord sues him in ejection, on being treated as the tenant, the transfer being in law inoperative, he cannot be said to have abandoned the holding, so as to entitle the landlord to re-enter.⁷

Or part.

Nor where the original tenant, after parting with a *portion* of the holding, continues *in actual occupation* of a portion of the land under a sub-lease as an *under-raiyat* from the purchaser. So far as the landlord is concerned, the original tenancy still continues unaffected and he is not competent to create a valid occupancy holding in favour of a third party by a new settlement⁸ in such a case.

(b) In joint possession with transferee.

There would obviously be no ground for concluding that the tenant has abandoned his holding, when he has sold only a *part* of it and continued *in joint possession* of it

¹ *Kabil v. Chunder*—20 Cal. 590: *Durga v. Doula*—1 C.W.N. 160: *Guzaffer v. Dalglish*—1 C.W.N. 162.

² *Dayamayi v. Ananda*—20 C.L.J. 52 F.B.=18 C.W.N. 971=42 Cal. 174 F.B.

³ *Kalim v. Mocham*—24 C.L.J. 113=36 Ind. Cas. 719 (Cal).

⁴ *Purna v. Chandra*—23 C.L.J. 304 F.B.

⁵ *Ram v. Jagernath*—1 P.L.J. 270.

⁶ *Rajani v. Ekkary*—11 C. W. N. 811=34 Cal. 689=7 C. L. J. 78 see also *Sailabala v. Sriram*—11 C. W. N. 873=7 C. L. J. 303: *Kali v. Upendra*—1 C. W. N. 163=24 Cal. 212: *Kali v. Arman*—13 C. W. N. 220: *Dinanath v. Bijoy*—9 C. W. N. 379=5 C. L. J. 294. *Madan v. Mohima*—33 Cal. 531=3 C. L. J. 343.

⁷ *Sristee v. Mudun*—9 Cal. 648: see also *Nadhu v. Kartic*—9 C. W. N. 56.

with the transferee, the rent continuing to be paid in its entirety in the name of the transferor.¹

The same principle applies where a purchase is made *in Execution* *execution of a decree for money* against the tenant. Thus, where *sale*. after the sale of a portion of a non-transferable occupancy holding in execution of a money decree, the tenant took a *sub-lease of a portion* of the land purchased from the auction-purchaser, the *plaintiff getting a settlement* of the holding *from the landlord*, sued to eject the auction-purchaser as a trespasser and obtained a decree against him; but when he attempted to execute the decree, the defendant, the representative of the original tenant who was still in occupation, opposed, with the result that a proceeding under O. 21 r. 100 C. P. C. '08 was thereupon instituted, which terminated in favour of the defendant, whereupon the plaintiff instituted a suit to recover rent from the defendant as his under-raiyat, *Held*—that the landlord was not competent to create a valid occupancy holding in favour of the plaintiff by the settlement as there was no abandonment by the original tenant nor forfeiture of the original tenancy, that as there was no relationship of landlord and tenant between the plaintiff and the defendant, the defendant was not estopped from questioning the title of the plaintiff and that even if he claimed rent that claim was bound to fail. But where the plaintiff purchased a non-transferable occupancy holding in execution of a money decree but before he took possession from Court, the defendants purchased the same in execution of another money decree and obtained delivery possession and the rent paid by them was accepted by the landlord, in a suit by the plaintiff to recover possession of the holding from the defendants as its prior purchaser, *Held*—that as the landlord who had a right to re-enter upon the land on its abandonment by the original tenant, had accepted rent from the defendants and treated them as tenants, there was practically a settlement with them by the landlord and that therefore the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the defendants claiming under the landlord.²

There is a fundamental distinction between a sale and a mortgage of a holding. A tenant who executes a deed of *Distinction between sale and mortgage.*

¹ *Raghubar v. Ram*—36 Ind. Cas. 653 : *Mathur v. Ganga*—10 C. W. N. 1033=33 Cal. 1219. *Gagan v. Alak*—17 C. W. N. 698 : *Kamaleswari v. Habibulla*—2 C. L. J. 369.

² *Iswar v. Kailash*—41 Ind. Cas. 639 (Cal.)

Mortgage—
with or
without
possession.

sale may perhaps be deemed to have severed his connection with the holding, although it would be difficult to maintain this view in the light of the several decisions. The case of a *mortgage*, however, is reasonably free from difficulty. The mortgage is executed on the assumption that the tenant has a transferable interest in the land. The execution of a mortgage, by itself, does not imply a severance of the tenant with the holding, because *it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest* in the land. Consequently when a tenant executes a *usufructuary mortgage* in favour of a third party and places him in possession, there is no repudiation of the relationship of landlord and tenant as between himself and the person under whom he holds the land. The case is stronger where the tenant after the execution of the usufructuary mortgage has (remained in possession of a small portion of the land as a sub-lessee under the mortgagee), paid rent to the landlord, and throughout expressed his willingness to hold himself responsible for due payment of rent. It cannot consequently be suggested that there has been any severance of his connection with the land. In so far as the physical enjoyment of the right is concerned he is still in occupation of a part of the land of the holding. Under these circumstances the view cannot be seriously maintained that the tenant has abandoned the holding and the landlord has become entitled to re-enter¹. On principle, therefore, there is no justification in holding that a tenant who has merely executed a *mortgage with or without possession* has abandoned his holding. Though the mere execution of a usufructuary mortgage might not be sufficient to establish abandonment, but when it is found as a fact that the *raiyat* did not live in the village and had not got any connexion with the *jote*, *Held*—that these were sufficient to hold that there was abandonment of the holding². Again, where the title of the tenant ceases as against the mortgagee either by foreclosure or sale of the mortgaged property, and his possession also completely ceases, there is an abandonment by him³. Thus the unauthorised transfer of a holding or the parting with the possession of it in whole or in part, does not *per se* work as a forfeiture under the B.T. Act. There must be something in the nature of an abandonment by the tenant or something of the kind⁴.

¹ *Mahadeo v. Pachkari*—16 C. W. N. 322, where all the cases on the point cited and discussed.

² *Monohar v. Ananta*—17 C. W. N. 802.

³ *Ram v. Jawaher*—12 C. W. N. 899=7 C. L. J. 72.

⁴ *Bhupendra v. Bunsu*—40 Cal. 870.

From what has been stated above it is clear that "the transfer by a raiyat of a non-transferable occupancy holding is operative *as against the landlord* in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a *sale of the whole holding*, the landlord, in the absence of his consent, is ordinarily entitled to *enter* on the holding; but where the transfer is of a *part* only of the holding, or *not by way of sale*, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, *unless* there has been (a) an *abandonment* within the meaning of Section 87 of the Bengal Tenancy Act, or (b) a *relinquishment* of the holding, or (c) a *repudiation of the tenancy*. Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case." This is the way in which a recent Full Bench of the Calcutta High Court has, after a full consideration of the whole question, summarised the law on the subject¹.

Summary of
law by recent
Full Bench.

V. Landlord's consent validates transfer.

Ordinarily the only persons interested in impugning the validity of the transfer of a non-transferable occupancy holding are the occupancy raiyat and the landlord. Where the *form* *r* transfers the holding and the *latter consents* to the transfer and accepts the transferee in place of the former tenant, there can arise no difficulty in the way of giving effect to the transfer. And it is perfectly clear from the authorities that the transfer of an occupancy holding which is not transferable by custom or local usage may be validated by *consent of the landlord*².

Consent of
landlord.

Such consent may be either *express* or *implied*. Consent is *express* where the landlord actually agrees to the transfer and recognises the transferee as his tenant in place of the original tenant on the holding.

Express or
implied.

But the consent may be *implied*. The landlord, by his own acts and conduct subsequent to the transfer, may be afterwards *estopped* from denying the title of the transferee. Thus the receipt of rent by a landlord from the transferee of

Landlord
may be bound
by estoppel
to recognise
transferee.

¹Dayamayi v. Ananda—20 C. L. J. 52=18 C. W. N. 971=42 Cal. 172 F. B.

²Radha v. Ananda—8 C. W. N. 235; Jogan v. Posun—8 C. W. N. 172; Sibbo v. Raj—8 C. W. N. 214 followed in Hari v. Uday—8 C. L. J. 261 = 12 C. W. N. 1086.

Receipt of
rent from
transferee.

a holding not transferable by custom will validate the transfer so as to give the purchaser a right of occupancy. For the acceptance of rent from the transferee means the assent of the landlord to the transfer¹. But in order that the doctrine of *estoppel* might apply it must appear that the zemindar was fully *aware* of the transfer and that the rent was received with such knowledge². Thus the payment of rent *marfat-wary* confers no *rai-yati* title on the *marfat-war*³. Receipt by landlord of rent from the transferee not on his own account, but as an agent of the transferer is not a recognition of transfer⁴. When rent is taken from a purchaser as *Sarburahkar* the purchaser is not recognised by the landlord as his tenant⁵. These decisions, as pointed out in a recent case⁶, have been based on very sound principles, for a landlord cannot refuse the rent of a holding merely because it is not paid by the tenant *personally*, and it would be inequitable to say that the receipt of rent from a third party acting as an agent of the real tenant is tantamount to the recognition of the creation of a new tenancy in the name of the actual payer. In such cases the *insertion of the name of the old tenant* is good evidence of the intention of the landlord not to accept the transferee as tenant. But, where the rent receipts did not describe the transferee as tenant, but described the rent paid as rent of the holding and the person paying as the occupier of the holding and as *paying rent on his own account*, it was held that there was a sufficient recognition of the transferee as tenant⁷. So, when the landlord received rent from the usufructuary mortgagee in possession and gave him receipts wherein the payment of rent was expressed to be "*through*" him as "*the mortgagee*," it has been held that the landlord recognised the transfer and was not entitled to recover *khas* possession⁸. In these cases it is not

¹ *Nobo v. Krishna*—W. R. Sp. (1864) Act X 112; *Mritunjai v. Gopal*—10 W. R. 466; *Bharat v. Ganga*—14 W. R. 211; *Alexander v. Dwarkanath*—25 W. R. 320; *Amin v. Bhairo*—22 W. R. 493; *Hamid v. Ashmat*—11 C. W. N. C1XVIII. *Dwarkanath v. Tarini*—5 C. L. J. 294=11 C. W. N. 513=34 Cal 199.

² *Gour v. Rameswar*—6 B. L. R. App 92.

³ *Khudiram v. Rukhini*—15 W. R. 197 *Kurani v. Sajani*—12 C. W. N. 539; *Gour v. Rameswar*—6 B. L. R. App. 92.

⁴ *Rasomoy v. Srinath*—7 C. W. N. 132; *Digbijoy v. Ata*—17 C. W. N. 156; see also 6 below.

⁵ *Rasomoy v. Srinath*—7 C. W. N. 132; *Deb v. Baidya*—14 C.W.N. 68.

⁶ *Debnarian v. Baidyanath*—14 C. W. N. 68.

⁷ *Nabakumari v. Behari*—11 C. W. N. 865 PC.=34 Cal. 902 PC.=6 C. L. J. 122 PC.

⁸ *Barada v. Hemlata*—13 C. W. N. 833=10 C. L. J. 610 reversing *Barada v. Hemlata*—13 C. W. N. 242.

unreasonable to hold that the landlord accepted rent from the transferee with full knowledge of the transfer and cannot subsequently be allowed to repudiate him as a tenant. But, as pointed out by Jenkins C. J.:—"the courts have yielded too freely to the temptation of being blinded to realities by the words *Murfatdar* and *Guzratdar* and so the true facts have suffered * * * * there are expressions in the cases which would suggest that where these words appear no recognition can be inferred. I think however *each case must be determined on its own circumstances*, and the court should determine in each case whether or not, on a consideration of all the facts—not merely by giving undue weight to the word used—a legal inference is or is not to be drawn that there has been a recognition establishing a relationship of landlord and tenant between one who has paid and another who has received rent for a number of years¹."

In one case the Court went so far as to hold that *payments to a gomasta and receipt of rent by him on behalf of his employer were not binding on the landlord*². But as was pointed out by Mookerjee J. of the Calcutta High Court:—"It cannot be laid down as an inflexible rule of law that the landlord is not bound by the act of his *gomasta* in recognising the transferee of an occupancy holding. This would clearly depend on the *authority* of the *gomasta*. If he acted within the scope of his authority, there is no reason why the Zemindar should not be bound by his acts, and the acceptance of rent by him from the transferee will be a sufficient recognition of his status as tenant of the transferred holding. The question of the *gomasta's* power to bind his landlord must be decided on the particular facts of each case. The burden of proof, in the first instance, is on the landlord to prove the extent of authority of the *gomasta* as a matter peculiarly within his knowledge (Section 106 Indian Evidence Act)."³ Where the transferee proves that he has deposited the rent of the disputed holding and that the deposit has been withdrawn by the landlords' agent, he has discharged such onus as lies upon him. It is then for the landlord to shew that the withdrawal was outside the scope of the agents' authority.⁴ Where, therefore, a *gomasta* accepted rent from the transferee, and the landlord, till suit, did not repudiate the act of his agent, nor did he

Guzarat-marfat-wari receipts.

Receipt or withdrawal of rent by *gomasta* if binding on landlord.

Burden of proof of his authority.

¹*Prabhabati v. Taibutunessa*—19 O.L.J. 62.

²*Bhajahari v. Aka*—16 W.R. 97. See also *Beni v. Gobardhan*—6 C.W.N. 823. *Beni v. Ramdhan*—10. C.W.N. 216. *Jagadiswar v. Joymani*—25. Cal 533. *Peari v. Gopal*—25 Cal 531.

³*Saduman v. Behari*—15 C.W.N. 953

⁴*Matihari v. Lachmi*—35. Ind Cas 81. (Cal).

Different
views.

offer to refund the money received on his behalf by the agent of which presumably he enjoyed the benefit during several years—it was held that under such circumstances the court may reasonably draw the inference that the act of his agent is *within the scope of his authority*. The Court may also in the alternative draw the inference that, as the landlord has *acquiesced in the act of his agent* for a number of years, it is no longer open to him to repudiate it, even though it be a fact that the agent acted *beyond the scope of his authority*. Where, therefore, the *gomasta* accepted rent from the transferee of a *jote* and the landlord failed to show that he acted beyond the scope of his authority. *Held* that the fact constituted sufficient recognition of the transferee by the landlord¹. But the Patna High Court has taken an entirely different view of the matter. Thus Chapman, J. of the said Court in a very recent case has observed:—“I am not prepared to assent to what was said in that judgment” regarding the question of burden of proof. “Ordinarily the duties of the *gomasta* are merely the collection of rent and the granting of receipts for rents paid.” He is held out as having only a limited authority to give receipts on behalf of the landlord. A person dealing with such an agent is bound to assure himself that the limits of his authority are not exceeded. In the absence of any evidence that he (is) actually and ostensibly vested with wider authority, the presumption (is) that the granting of receipts by him (is) not binding on the landlord as a recognition of a transfer. In order to rely upon a receipt granted by a landlord’s *gomasta* as evidence of recognition by the landlord of the transfer of a holding, it is necessary for the transferee to show that the *gomasta*’s duties actually and ostensibly included at least some of the duties of management. And Roe, J. in the same case points out:—“The suggestion that it should be presumed until the contrary is proved that a *gomasta* has power to recognise transfers on behalf of the landlord, loses sight of the fact that the right to veto such transfers is not only one highly prized by the landlord but one from which a considerable source of income may be derived. It is idle to suppose that the landlord would ordinarily delegate to a *gomasta* power to sanction transfers with the inevitable result that the *salami* would be paid to the *gomasta* instead of to the landlord.”² And Chamier, C.J. of the same Court in another case in which the rent was received by the *Patwari* (whose position is similar to

¹*Sadumon v. Behari*—15 C. W. N. 953.

²*Janki v. Thakur*—2 P. L. J. 221.

that of a *gomasta*) observed:—"The position and duties of a *patwari* are well-known. He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or incidental to his express authority. It is not suggested that he has authority to manage any part of the property. In my opinion it is not within the scope of authority of a rent-collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a *manager*. I cannot accept the suggestion that it lay in the landlord to prove that the *patwary* had not authority to consent to the transfer. Landlords would be in a very difficult position if it were held that the *patwary* and under-lings should be presumed till the contrary is shewn, to have the power to sign away their master's right".

Where the rent from the transferee of a non-transferable occupancy holding was accepted by the *thicadar* to whom the landlord had let out the land as middleman landlord, it must be held that the *thicadar* has recognised by his conduct and acquiesced in the transfer, and the superior landlord having put the *thicadar* in the position in which he had done, is bound by his action and conduct.²

Receipt of
rent by
thicadar.

The power of the *karta* of a joint Hindu family, as described in the leading case on the point noted below³ includes the power to recognise or consent, on behalf of the joint family, to the transfer of an occupancy holding held by a *raiya*t under the joint family as landlords and not transferable without their consent duly given by themselves or on their behalf.⁴

By *karta* of
joint family

The same result will follow from the landlord having allowed sums paid into the collectorate as rent by the transferee to be carried to his credit⁵. Similarly acceptance of rent deposited by the mortgagee as such without protest even for one occasion amounts to recognition. Even acceptance under protest would operate in favour of the payer as a waiver of any forfeiture incurred, and the protest under which the landlord receives rent deposited by a mortgagee of a holding does not make the receipt non-the-less a receipt of rent from the mortgagee⁶. The question when the withdrawal by

Recognition
by landlord.
Other cases.

¹ *Wyatt v. Sheo*—36 Ind Cas 777 (Pat.)=1 P. L. J. 414.

² *Bhagloo v. Mahadeo*—36 Ind Cas 283 (Pat.)

³ *Chackun v. Paran*—9 W. R. 483.

⁴ *Galupadi v. Purno*—21 O. W. N. 774.

⁵ *Ram v. Dashobhuj*a—18 W. R. 195; *Godadhar v. Kshetra*—7 W. R. 450.

⁶ *Motookdhari v. Jugdip*—21 C. L. J. 261=19 C. W. N. 1819 following *Kali v. Fusle*—9 Cal. 843 : see also *Baroda v. Hemlata*—13 C. W. N. 242.

the landlord of deposits in court of money due under a rent decree before and after the sale in execution thereof amounts to recognition will be dealt with hereafter. The landlord suing the transferee for compensation for use and occupation and not asking for his ejectment must be taken to have recognised the transferee.¹ Such a suit is treated as a suit for rent. But a demand to give up possession coupled with a demand to pay the produce of the land or the price thereof is not a demand for rent, and cannot be regarded as a recognition of the person from whom the demand is made as his tenant². So the fact of the landlord having made the transferee a party to a suit for rent and accepted a decree against him jointly with the original tenant amounts to recognition of the transferee.³ Again, when a third party had purchased the *jote* from the tenant and the landlord assigned his mortgage on the same to him with full knowledge of his purchase and of the fact of his taking the assignment in order to perfect his title which was not valid, unless recognised by him, the landlord is *estopped* from denying that the purchaser had acquired a right to the *jote*.⁴ Where the plaintiff, the mortgagee of an occupancy holding, obtained a decree on his mortgage, and purchased the property at the sale in execution thereof. He then settled the amount of *na-ar-ana*, paid a part of it to a co-sharer landlord (defendant No. 6), took the settlement from the other co-sharer landlords and went to defendant No. 6 to have the settlement from him on payment of the balance of the *na-ar-ana*, but was told that the land had already been leased out to defendant No. 1. Thereupon he brought the suit for recovery of the holding. *Held*—that the rule of *estoppel* contained in Sec. 115 of the Evidence Act was particularly applicable to the facts of the case, that the consent of the landlord to the purchase of the plaintiff gave the latter a complete title and he could not be ousted by the landlord by any subsequent action of his.⁵

Consent must
be of 16
annas land-
lord.

The consent must be by the *whole body* of the landlords.⁶

¹ *Abdul v. Rajendra*—13 C. W. N. 636.

² *Deonandan v. Meghu*—5 C. L. J. 181.

³ *Ram v. Krishna*—23 W. R. 108; *Mahomed v. Chandi*—7 W. R. 250.

⁴ *Mahesh v. Maharej*—17 C. W. N. 70. *Sushila v. Indu*—18 Ind. Cas. 328.

⁵ *Hari v. Ram*—14 Ind. Cas. 28.

⁶ *Sukurddin v. Hemangini*—16 C. W. N. 240. Rampini's Notes on 188 B. T. Act.

What the effect of consent or settlement by co-sharer landlords is has led to a sharp difference of judicial opinion. As pointed out by Coxe J. in a very recent case:—
 “It is perhaps somewhat unfortunate that such settlement should be recognised at all. They lead to continual disputes. It is physically impossible to let an undivided share of a field to a raiyat for actual cultivation, and to let the whole field is an unwarrantable invasion of the rights of the co-sharers. It must however be admitted that such settlements are common.”¹ But where some of the joint landlords have assented to the transfer of a non-transferable occupancy holding or subsequently recognised the transferee, they are not entitled to dispute the title of the purchaser or to eject him. The effect of a recognition of the tenancy of the transferee by some of the co-sharers would obviously be to subdivide the holding against the will of the other co-sharers.² A settlement by a co-sharer landlord does confer a right with regard to the share of that landlord. Therefore a transferee of a non-transferable occupancy holding who afterwards obtains a recognition from some of the co-sharer landlords acquires a good title with regard to the share of those landlords and as such has the right to joint possession of the holding.³ But the co-sharers could not by their recognition affect the interest of the remaining co-sharers. They are entitled to eject the purchaser from their shares only and to recover joint possession. But if they sue to eject him from the entire holding on the footing that he is a trespasser, a decree for joint possession ought not to be made in their favour.⁴ The recognition by a co-sharer may not as such prevent the other co-sharers from effecting a subdivision of the holding.⁴

Consent of co-sharer landlord—Its effect.

Regarding the effect of the landlord's consent on the right of the transferee there appears to be a conflict of judicial opinion. According to some cases even if the Zemindar consented to the transfer, the transferee would thereby merely acquire a new jote on the same term as the original tenancy was held⁵, and when the landlord recognises the transfer it is open to him to recognise it on the footing that it is or is not the subject of an occupancy right⁶ and on a sale of the holding in execution of a decree for arrears of

Effect of consent of landlord.

¹ *Rojab v. Dina*—19 C. W. N. 1305.

² *Hossein v. Fakr*—10 C. L. J. 618.

³ *Umar v. Jadu*—32 Ind. Cas. 855.

⁴ *Mohamed v. Manada*—32 Ind. Cas. 577.

⁵ *Tara v. Surjo*—15 W. R. 152; *Hyder v. Bhubendro*—17 W. R. 179.

⁶ *Nalini v. Fulmani*—15 C. L. J. 388=16 C. W. N. 421, Per Stephen J.

rent a *fresh tenancy* must be regarded as having been entered into between the auction-purchaser and the landlord when the latter put the holding up to sale and the former purchased it¹. This view appears to have been taken by Mookerjee J. also in a recent case in which the transferee on his recognition as a tenant agreed to pay an enhanced rent in contravention of S 29 and it was held that inasmuch as the holding has not been transferable, the transferee was not an occupancy raiyat and consequently there was no rent payable by him which was enhanced.² If the consent on the part of the landlord be regarded as a new settlement in favour of the transferee, the supposed new settlement would not vest in the transferee any right of occupancy ; it would be the creation of a new holding with the transferee as the tenant for the first time. But, as pointed out in a later case, at the date of the sale (in execution of a rent decree) what is sold is the original holding and it therefore carries with it all its incidents.³ The lease is a subsisting lease and the auction-purchaser bought it subject to all its terms and incidents⁴. And as the holding passes to the purchaser, the occupancy right which attaches to it also passes along with the same to the purchaser. And in the case of a voluntary sale, when the landlord recognises the transfer, he recognises the transfer of the existing occupancy right as a valid transaction⁵.

VI. *Transfer, without such consent, whether void or voidable.*

Distinction
between void
and voidable.
transaction.

The next question to determine is whether, when a transfer of an entire non-transferable occupancy holding takes place the transaction is in law *void or voidable* ; if voidable, at whose option. It is almost elementary that if a transaction is *void* no right in favour of either party can grow under it, nor can it form the foundation of any estoppel.⁶ It is not necessary to have it set aside ; its invalidity may be set up whenever it is sought to be enforced. It is incapable of being confirmed or ratified.⁷ If, however, the transaction is *voidable* it is valid and

¹*Kali v. Troilokhya*—26 Cal. 315 (323) Per Rampini J.

²*Sarat v. Sham*—16 C. L. J. 73.

³*Raj v. Panna*—30 Cal. 213, Dissenting from 6 last page.

⁴*Lal v. Manmatta*—32 Cal. 288, dissenting from 2 above.

⁵*Hari v. Udoy*—8 C. L. L. J. 261=12 C. W. N. 1086.

⁶*Mohori v. Dharmdas*—30 Cal. 539.

⁷*Beni v. Dudh*—27 Cal. 156.

binding upon the parties and persons deriving title through them, whether by descent¹ purchase or otherwise, until avoided. It is perfectly clear under the authorities that the transfer of an occupancy holding which is not transferable by local custom or usage *may be validated by consent* of the landlord.¹ When the landlord recognises the transfer as valid he recognises the transfer of the existing occupancy right as a valid transaction. If it had been a transaction absolutely *void*, as being opposed to law, no amount of consent on the part of the landlord could have validated it. It follows, therefore from these premises that the transfer of an occupancy holding which is not transferable by local custom or usage is not a *void* transaction. It is only *voidable* and that *at the instance or option of the landlord only*, the usual ground upon which a voidable contract between persons competent to contract may be avoided being out of the question in such a case.² The question of non-transferability cannot be raised by any person other than the landlord: in other words, it may be raised between the landlord and the tenant and not between the tenant and the transferee³. The transferee having purchased the tenant right, whatever its precise nature, it has a market value and is capable of being recognised by the landlord. He has therefore a right to be protected in the enjoyment of his purchase against all the world, except possibly the landlord.³ And though the landlord may not recognise him he has a subsisting right. The landlord may not recognise the right but the right transferred cannot be denied.⁴ These remarks apply only to cases where the *whole* holding is transferred by sale. But where only a part of it is sold or where the transfer is *not by way of sale*, but by mortgage, the transfer is not voidable at all even at the instance of the landlord himself. The transfer not being a void transaction, it is binding between the parties, *viz.* the transferor and the transferee, and all persons claiming through them, and its invalidity cannot be set up by the occupancy raiyat or any person claiming title through him.

Transfer voidable at instance of landlord.

Transferee's right.

Transfer binding between the parties,

¹Radha v. Ananda—8, C. W. N. 235; Jogun v. Poshun—8 C. W. N. 172; Sibbo v. Raj—8, C. W. N. 214.

²Hari v. Udoy—8 C. L. J. 261=12, C. W. N. 1086 reversed in 12 C. W. N. 937 though on different ground.

³Ambika v. Aditya—6, C. W. N. 624.

⁴Basarat v. Sabulla—2, C. W. N. CCXXIX; Ambika v. Aditya—6, C. W. N. 624; Parain v. Dinabandhu—9 C. L. J. 82n.

⁵Brahmadeo v. Ram—16 C. L. J. 139.

VII. *The Right of the transferee as against the landlord.*

When tenant
does not
abandon.

The question still remains what is the position of the transferee without title as against the landlord, be he a purchaser of the whole or a portion of the holding or a mortgagee, when the original tenant continues even after the transfer to maintain his former relationship with his landlord? Can the landlord sue him in ejectment over the head of the tenant, who, in the conditions supposed, has not abandoned his holding? The right of possession being in the tenant, a suit in ejectment can lie in such cases only at the instance of the tenant, and he, it may be noted, may be precluded by estoppel or by the terms of the transfer from exercising that right. However that may be, it seems to be impossible on principle to hold that the landlord can sue the transferee in ejectment, when the *abandonment* by the transferor (the original tenant) is not made out. The observations of their Lordships in the cases noted below¹, so far as they go, support this view, though the question did not arise in these cases and was not decided in them. The point actually arose in a case in which it was held that the landlord, though bound to recognise the subsisting tenancy of the transferor, could yet treat the transferee as a trespasser and recover a decree for possession as against him.² This view of the law would enable the tenant to collude with the landlord to defraud the transferee, and a decree in favour of the landlord for ejectment against the transferee only, when the transferor is maintained in possession, is practically useless, as there is nothing to prevent the transferor from putting the transferee back into possession as often as the transferee is ejected at the instance of the landlord. If the the landlord has any cause of action at all against the transferee it appears at most to be for a declaration that transfer is not binding on him.³ This was the state of the law before the F. B. decision which has laid down that the question depends upon whether there was (a) an *abandonment* within the meaning of Sec. 87 B. T. Act or a *relinquishment* of the holding (*i.e.* a *surrender* of it within the meaning of Sec. 86 B. T. Act) or a *repudiation of the tenancy*.⁴ To decide

Collusion
between
landlord and
raiyat against
transferee.

¹ *Kalinath v. Upendra*—24 Cal. 212=1 C. W. N. 163 (165). *Nadhu v. Kartick*—9 C. W. N. 56 (60). *Mathur v. Ganga*—10 C. W. N. 1033.

² *Dina v. Krishna*—9 C. W. N. 879 followed in *Madan v. Mahima*—33 Cal. 557.

³ *Guzaffer v. Dalglish*—1 C. W. N. 162. See also *Durga v. Doula*—1 C. W. N. 160.

⁴ *Dayamoyi v. Ananda*—20 C. L. J. 52 F. B.—42 Cal. 172 F. B.—18 C. W. N. 971.

whether there is one or the other, it must be borne in mind that there is a fundamental distinction between the transfer of the *whole* and a *part* or by way of an out-and-out sale or a pure mortgage of the holding, so far as regards the respective rights of the landlord and the transferee are concerned. As has been already pointed out, where a tenant has transferred his entire holding which is not transferable and has surrendered possession thereof to the transferee, he is considered in essence to have abandoned the holding, the tenancy is considered to have terminated, and the landlord becomes entitled to re-enter on the same. The purchaser, who is in possession of it by virtue of his purchase, is in possession without any title which is valid as against the landlord, and cannot therefore retain possession as against him. The landlord, therefore, is entitled to enter on the holding by ejecting the transferee as a trespasser. Where on the other hand, the transfer is of a part only of the holding, or not by way of sale (but by way of mortgage and the like) there is no abandonment of the holding in the eye of the law, and the landlord is not entitled to recover possession thereof. The tenancy still subsists and interposes a barrier between the purchaser and the landlord. The purchaser therefore is entitled to retain his possession even as against landlord,¹ and the landlord is not, therefore, competent to create a valid occupancy holding in favour of another² in such a case.

Distinction between transfer of whole and of part.

In former case landlord can re-enter; In latter, can't.

There was a considerable difference of opinion upon the question whether in the case of a transfer of a *portion* of an occupancy holding, such transfer not binding the landlord, unless made with his consent, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him. There is a distinct authority for the proposition that the mere fact of the purchaser having once had possession, would not entitle him, as against the landlord, to recover possession in a suit not under S9 of the Specific Relief Act. As against the landlord, he must shew some *title*. And as the transfer is not binding on the landlord, he is unable to shew a title on which he could claim to be re-instated in possession³. But, it was pointed out in a later case that it

Dispossession of transferee by landlord.

¹ *Purna v. Chandra*—23 C. L. J. 304 F. B.—20 C. W. N. 586 F. B.

² *Kalim v. Maclean*—24 C. L. J. 113.

³ *Kuldip v. Gillanders*—28 Cal. 615. Distinguished in *Binodini v. Peary*—8 C. W. N. 55; *Asgar v. Asabuddin*—9 C. W. N. 134; *Kamaleswari v. Hurballav*—2 C. L. J. 369; *Ashok v. Karim*—9 C. W. N. 843; *Gow v. Tarajan*—8 C. L. J. 161 (suit against tenant not landlord) followed in *Manada v. Madhu*—unreported S. A. 528 (1901).

His right to
recover pos-
session.

was no authority for the proposition that a purchaser of a *portion* only of a *jote* gets no title at all¹, and the principle stated above seems hardly to be consistent with the principle laid down in several other cases that where an occupancy raiyat transfers a portion of his holding but remains in possession of the remainder and pays rent for the entire holding, the tenancy subsists and there is no abandonment of the entire holding which alone can entitle the landlord to eject the transferee.² It follows that so long as the transferee of a portion of a holding can remain in possession, he can *shelter himself under the title of his transferor*, the occupancy raiyat, and the landlord cannot evict him by process of law. If however, the landlord could, by any means, prevent his getting into possession, or, when he has got into possession, could oust him by force the transferee had no remedy at law by suit against the landlord. This is no doubt somewhat of an anomaly and puts a premium upon violence, the landlord being tempted to take the law into his own hand³. The matter was consequently referred to a Full Bench, which has recently decided that the purchaser in such a case can recover possession by suit⁴.

Transferee's
tenancy by
adverse
possession.

In most of the cases of the transfer of a non-transferable holding, the transferee remains in possession of it, and pays rent to the zemindar, though in the name of the original tenant, the transferor. In such cases, when he has been in *possession for more than twelve years*, the question may arise whether the transferee has not acquired a title to occupy the holding as an occupancy raiyat by reason of his possession over twelve years and by the *assertion of a right to possess it as such a raiyat adversely to the landlord* for more than twelve years, and whether the landlord's suit to recover *khas* possession of the holding from the transferee may not be barred by time under such circumstances. It cannot now be denied that a limited interest in land may be acquired by adverse possession. The possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete

¹ *Ashok v. Karim*—9 C.W.N. 843.

² *Kabil v. Chandra*—20 Cal. 590; *Durga v. Doula*—1 C.W.N. 160; *Gusaffar v. Dalglish*—1 C.W.N. 162; *Kamaleshwari v. Harbulla*—2 C.L.J. 369.

³ Referring Judgment *Per Chitty & N. Chatterjee*, JJ. in 18 C.W.N. 971. F.B. 978.—20 C.L.J. 52 F.B.

⁴ *Dayamayi v. Ananda*—18 C.W.N. 971 F.B.—20 C.L.J. 52 F.B. overruling *Kuldip's case*—26 Cal. 615.

interest in the property operates to bar a suit for the whole property; but such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest. The nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express determination of the person relying on it; and there can be no acquisition by adverse possession of an absolute title when nothing but a limited interest has been asserted¹. Where the transferee not only does not repudiate but expressly admits the title of the landlord and alleges a settlement from him, his possession consequently has never been adverse *to the extent of the entire interest of the owner*; if as a matter of fact he never obtained settlement, he may have *acquired the status of a tenant* by the assertion of such limited title and possession in that character for the statutory period, and his possession will be that of a person who has actually obtained a settlement from the owner². When, therefore, a transferee takes possession of the land within the Zamindari and professes to do so in the character of a tenant, the landlord is dispossessed in a limited sense, in other words, he is deprived of actual or *khas* possession of the lands. His title to recover actual possession would be barred, although his title to receive fair rent would not be barred, the possession of the transferee, so far as the latter right is concerned, having never been adverse, and the transferee under such circumstances acquires by prescription the limited interest which he set up *viz* the interest of a tenant³. Thus where the landlord sues to recover possession of the holding from the transferee who has been in possession of it for about thirty years on the ground that the tenancy which existed in favour of the original tenant (transferor) has come to an end whether by reason of abandonment or by forfeiture (by the transfer) *which occurred very many years more than twelve prior to the commencement of the suit and the transferee met him by the production of rent-receipts, extending over the same period, shewing receipt of rent paid by his predecessor (and himself) but which were all Marfatwari (or Guzaratwari) receipts, in which the name of the original*

¹ *Ichharam v. Nilmani*—7 C.L.J. 499=12 C.W.N. 636=35 Cal. 473. following *Ishan v. Ramranjan*—2 C. L. J. 125 *Pakpo v. Sudharam*—8 C.L.J. 557.

² *Debnarian v. Baidyanath*—14 C. W. N. 68: *Tarak v. Harish* 16 C. L. J. 548: *Protap v. Biraj*—19 C. L. J. 77.

³ *Moti v. Kalu*—19 C.L.J. 321.

tenant was entered as being the tenant and the purchaser's as *marfatdar* (or *guzaratdar*), it has been held that the Statute of Limitation bars the suit, so far as it seeks possession, and the only way of over-coming this bar would be by establishing a case within S 18 of the Limitation Act, but that there was no complete extinguishment of the plaintiff's title, and the Statute Limitation only operates to create a limited interest of the tenancy in favour of the purchaser¹. Here the transferee has been openly in possession of the land ever since the purchase for more than twelve years and no circumstances exist which attract the operation of S 18 of the Limitation Act. It may here be pointed out that the law stated above has been held applicable to a defence to an action for ejectment but it has not yet been decided whether it applies to a case where the purchaser in occupation comes before the court and asks for a declaration that he has acquired the status of the holder of a non-transferable occupancy holding².

As against the landlord who insists upon the right to refuse to recognise a transfer of an occupancy holding which is not transferable without his consent, and who has not so conducted himself as to be estopped from asserting that right, the transferee acquires nothing at all.

Landlord's
suit for khas
possession.

In the case of an unauthorised alienation, the landlord is entitled to recover *khas* possession of the holding by ejecting the transferee. A tenant is not a necessary party to such a suit, when he is no longer on the land³, and if he is made a party he is entitled to ask for the dismissal of the suit as against him on the ground of want of cause of action. When the holding is under several co-sharers, it is not necessary that all the landlords must join together in bringing the suit, S 186 B.T. Act being no bar to a suit being brought by one of them singly, as it is not a suit under the B.T. Act. Such a suit should be brought within 12 years and where the right to possession accrued long before 12 years of the commencement of the suit, such a suit is barred unless the plaintiff makes out a case under S 18 of the Limitation Act⁴.

¹ *Prabhabati v. Taibutunnessa*—19 C. L. J. 66=17 C.W.N. 1088.
1088 followed in *Panchkari v. Maharaj*—19 C. W. N. 139.

² *Nabin v. Nilkamal*—36 Ind. Cas. 11.

³ *Ram v. Jawahir*—7 C.L.J. 72; *Chand v. Ramani*—17 C.W.N. 1106.

⁴ *Prabhabati v. Taibutunnessa*—17 C.W.N. 1088.

VIII. *Effect of surrender or abandonment of holding by raiyat after transfer.*

We have already seen that where the sale is of a part only of the holding, the landlord, though he has not consented, is not ordinarily entitled to recover possession of it unless there has been an abandonment, a *relinquishment*, or a *repudiation*, of the tenancy. The strict application of the law as thus interpreted in these decisions, has involved very great hardship on the landlord. For the tenant, by retaining a small portion of the holding, is always able to avoid the provision of the law which, in the absence of custom or usage, prevents alienations without the landlord's consent. In order to avoid this, the landlords are often found to resort to the means of inducing their raiyats to surrender the whole or a part of their holdings, either on condition of resettling the same with them or without such condition, and then, on getting the surrender, to keep the lands in *khas*, or resettle them with the original raiyats or third parties; and cases very often arise in which the landlords or their lessees then sue the purchaser for ejectment. The question we propose to discuss is whether such arrangement is legally valid so as to affect the rights of the purchaser of a part of the holding.

Landlord's hardship on part transfer by raiyat.

Getting surrender a means of avoiding it.

Raiyat's right of surrender when holding subject to incumbrances.

The B. T. Act only protects "*incumbrances* secured by a registered instrument."¹

What is meant by '*incumbrance*' is not defined in that section but the following definition of the word is given elsewhere and for a different purpose *viz.* "any lien, sub-tenancy, easement or other *right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein*"². In the Transfer of Property Act, IV of 1882 where the word is also used but no definition of it given, the meaning attached to it in the English Conveying Act of 1881 has been accepted, namely "*a mortgage in fee or for a less estate, and trust for securing money and a charge of a portion annuity or other capital or annual sum*"³ and that meaning was accepted for the purpose of this section in a reported case.⁴

Meaning of incumbrance

¹ Act VIII of S 86 (b).

² Act VIII of 1885, S 161.

³ 44 and 45 Vict. C 41 S 2(VII).

⁴ *Tomizuddin v. Khoda II*, O.L.J., 162=14 C.W.N. 229: *Askar v. Gopi*—18. C.L.J., 257. *Zamir v. Bissesswari*—25 C.L.J. 480.

Sale of part
of holding is
not so.

From this it is clear that though a mortgage or a sub-lease by the tenant may be an *incumbrance* within the meaning of the section and so protected, the sale of a part of a non-transferable occupancy holding is not so, in as much as the holding being non-transferable, the *limitation of the interest of the transferor*, so far as the transferred portion is concerned, amounts to an absolute extinction of his right in it, as between himself and the transferee¹. Further, the word *incumbrance* here means an incumbrance which is binding between the tenant and the incumbrancer and not one which is binding on the landlord². Therefore, to come within the protection, it must not only be shewn that a sale is a valid one but the validity of that sale and the resultant interest arising therefrom must be limited to the position of the transferor and the transferee, and not to the position of the superior landlord¹.

Not so
protected
under
§86 (6)
B.T. Act.

The unauthorised purchase of a portion of the holding cannot therefore create an *incumbrance* on the tenancy, since it is in no way binding on the landlord and the tenant has parted with his interest out-right, though he may not have got rid of his obligation to pay the full rent to the landlord³. So the protection which the law affords to the mortgages and the like transactions by the tenant cannot extend to the sale by him of a part of a holding.

Effect of F.B.
decision on
surrender
of whole
after transfer
of part.

The next thing that is necessary to be considered is the effect of the recent F.B. decision. It has been decided by the F.B. that where the transfer is of a *part* only of the holding, the landlord is not entitled to recover possession of the holding, unless there has been an *abandonment*, or a *relinquishment*, of the holding or a *repudiation* of the tenancy. This contemplates a case where, after the sale of a *part* only of the holding, the raiyat surrenders the *whole* holding to the landlord and the relinquishment of a holding here evidently means the relinquishment of the *whole* holding and not a *part* of it⁴. And it is only in such a case that the landlord is entitled to recover *khas* possession of the holding by ejecting the purchaser of the part of it.

Surrender of
part.

But the *whole* holding may not be surrendered but only a *portion* of it. The B. T. Act does not render the surrender of a *part* and its acceptance by the landlord illegal⁵. The part surrendered may be either the *part already transferred*

¹ *Tomiruddin v. Khoda*—11. C.L.J. 16 = 14 C.W.N. 229 :

² *Mahammad v. Isab*—21, C.L.J. 185.

³ *Ramani v. Kalimuddi*—17 C. W. N. 1101

⁴ *Zamir v. Bissewari*—25 C. L. J. 480 (485)

⁵ Act VIII of 1885, § 86 (7)

or the remaining portion. We shall consider these two cases separately. And here we have a radical divergence of judicial opinion—one view is adverse to the rights of the purchaser and in favour of the landlord, the other just the contrary. Conflict of decisions.

Where the raiyat sold a portion of a non-transferable occupancy holding without his landlord's consent and subsequently *refused to pay rent for the transferred portion*, on the ground that it was relinquished in favour of the purchaser and *tendered to the landlord the proportionate rent due* in respect of the remainder of the holding still in his possession, it is open to the landlord to decline to accept an apportionment of the rent (and thereby to recognise the division of the holding) and to institute a rent suit and bring the holding to sale in execution of any decree that he may obtain. But this is not the only course open to him. He is also at liberty to *accept from the raiyat the amount of rent tendered by him for the land he still holds*, without prejudice to any right that he may have as proprietor in respect of the transferred portion. The transfer by the raiyat coupled with his subsequent refusal to pay rent of the transferred portion, clearly amounts on his part to a disclaimer of all his right, title, and interest in the transferred portion. If the landlord *accepts the apportionment of the rent* for the portion of the holding still remaining in the raiyat's possession but declines to recognise the purchaser of the portion sold as his tenant and brings a suit against the purchaser and his vendor for the recovery of *khas* possession of the portion of the lands sold, there is no answer to the landlord's suit. The present case is, therefore, clearly distinguishable from those cases where after transferring a portion of the holding the tenant *continues in possession of the remainder* and to pay, or, any rate does not deny his liability to pay, the rent due in respect of the whole holding. In case of that kind it is familiar law that there is no *abandonment* or surrender of the holding either as a whole or in part.¹ (i)
Surrender of transferred part.

Landlord can eject purchaser.

In this view of the law there is no difference where one portion of the holding is transferred and the remainder is surrendered. Thus after the sale of a portion of his holding an occupancy raiyat may surrender that portion, or the remaining portion, or the whole, of the holding to his landlord and upon such surrender the landlord can eject the purchaser as a trespasser. (ii)
So also on surrender of remaining part.

¹ *Kunja v. Bama*—43 Cal. 878.

Re-settlement
after surren-
der.

If legal.

Effect on
tenants'
right.

In almost all cases where surrender is made after the transfer by the raiyat, it is usual for the landlord to come to an agreement with the raiyat according to which he *resettles the holding to him after getting the surrender from him*. In such cases the question arises whether the arrangement is "a legal fiction which the landlord is entitled to resort to in order to recover from the purchaser who has no title as against him or is it an act done by the tenant of the landlord in fraud of the purchaser to which the landlord made himself a party"? ¹

The B. T. Act provides that save in the case of an incumbrance existing on the holding nothing in the section shall affect any *arrangement by which a raiyat and his landlord may arrange for a surrender of the whole or part of the holding*.² The unauthorised purchase of a portion of the holding cannot, as we have seen, create an incumbrance on the tenancy. Further the law lays down :—"When a raiyat has surrendered his holding, the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself"³ Holmwood J. in the case already referred to observed :—"the effect of the *Kabuliat* is to surrender the whole of the original holding and create a new holding altogether."⁴ So also in the very recent case already referred to Newbould J. observes :—"I cannot see that this clause is any bar to the landlord making a fresh settlement with the *original tenant after his surrender*. Even if the agreement to make a resettlement was entered into *before the surrender*, this, *in the absence of collusion* would not make the surrender invalid. There is nothing in the law to prevent a surrender being made subject to conditions"⁵

On landlords'
right.

So far as the landlord's right is concerned it has been pointed out by Holmwood J. in that case :—"the landlord cannot eject the transferee as long as the tenancy subsists, but we know of no authority for holding that the landlord cannot get rid of the *original tenancy by a valid contract legally made with his tenant*, determining the tenancy and creating a new one. And though the tenant may be answerable to the purchaser for damages and compensation for breach of contract, the landlord cannot be in any way bound to protect or recognise any right in the transferee, and there is no legal bar to his accepting the tenants' surrender

¹ *Ramoni v. Kalimuddi*—17 C. W. N. 1101

² Act VIII of 1885 S 86 (7)

³ *Ibid* (5)

⁴ See 1 above.

⁵ *Zamir v. Bisseswari*—25 C.L.J. 480 : *Tamij v. Brajendra* 22 C.W.N. 967.

of the whole or a portion of the holding under S86 (5) B. T. Act. Further he has no duty or obligation in relation to unauthorised purchaser, and cannot therefore be said to be a party to any fraud on the purchaser by the tenant."¹ "Further"—as pointed out by Newbould J:—"it was decided by the F. B. that where the transfer is of a *part* only of the holding, the landlord, though he has not consented, is not entitled to recover possession, unless there has been (a) abandonment or (b) relinquishment of the holding or (c) a repudiation of the tenancy. It may be conceded that the relinquishment of the holding means a relinquishment of the *whole* holding, but the whole holding has been surrendered. The part sold was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as implied surrender of the remaining portion."² From this it would seem that if the *whole* holding is surrendered the landlord becomes entitled to eject the purchaser of the part of it. But Richardson J. in a very recent case goes further. His Lordship observes:—"I can at present see no reason in principle why the effect of the surrender of the *whole* should differ from the effect of the surrender of a *part*. *Daya Moyi's* case does not seem to me to cover the question. The effect of the relinquishment or surrender of a part is not stated. But it seems consistent with the doctrine laid down as to the whole that the surrender of a part should also entitle the landlord to recover possession of that part."³ Thus, in the case noted below, the tenant sold a portion of his holding without the landlords' consent, and then *surrendered that portion* and the landlord *settled the surrendered portion* with a third party and it was held that he could eject the transferee.⁴ In another case, the tenant, after selling a portion of his holding, surrendered *that portion* and *executed a kabuliati in respect of the remaining portion* of the holding, it was held that upon such surrender the landlord was entitled to eject the transferee as a trespasser. Again where the tenant sold a portion of the holding to a third party and then *surrendered the whole*

Effect of F.B.
decision.

¹ *Ramoni v. Kalimuddin*—17 C.W.N. 1101

² *Tamij v. Brajendra*—22 C.W.N. 967 = *Zamir v. Bissesswari*—25 C.L.J. 480 per Newbould J. and Woodroffe J. in L.P.A. in 22 C.W.N. *Kunja v. Bama*—42 Cal. 878.

³ *Dastur v. Ram*—22 C.W.N. 972 (979) were all cases for and against the view and were fully discussed.

⁴ *Tomizuddin v. Khoda*—11 C.L.J. 16 = 14 C.W.N. 229

of it to the landlord and took from him lease at an enhanced rent in respect of the residue, it was *held* that the landlord was entitled to *khas* possession by ejecting transferee. ¹

Contrary
view.

This view of the law ignores altogether the *right of the purchaser to enforce his purchase as against his vendor* in addition to the right to compensation that he has against him. Further, it takes no note of the fact that as the tenant after his sale, is divested of all his interests in the land sold, he has nothing left to surrender to his landlord, and consequently the surrender made by him is invalid. This view, therefore, did not commend itself to all the learned Judges of the High Court. Thus, as observed by D. Chatterji, J. in a very recent case already referred to:—"It was held by the F. B. that the sale of a portion of an occupancy holding is valid and the landlord has no right to *khas* possession of the land. The mere fact of the transfer of a part does not entitle the landlord to evict the purchaser, although the sale is not binding upon him and he is not bound to recognise the purchaser as a tenant. When the tenant sells a portion of his occupancy holding he has *no right or interest left in the same*. He has, *nothing to surrender* and the *landlord has no right to eject the purchaser*. Then there is an amalgamation of these two nothings, and at once the landlord is competent to eject the purchaser. It is true that the landlord is not bound by the sale and can accept a *partial surrender*; but this means a surrender of something which the tenant has to surrender. Apart from the meaning of the word '*surrender*' in English law, the word has a meaning as a word in the English language, to give up, or resign, or yield to the possession of another; but the tenant has no right to give up or resign or yield what he has already sold. In this view of the case surrender is a misnomer for the act of the tenant and S 86 (5) B. T. Act, even if it applies to *part* surrender (for the clause speaks of surrender of the holding), would not entitle the landlord to take *khas* possession. Cl. (7), whilst it renders a *part* surrender by consent valid, does not make Cl. (5) applicable to a part surrender. A raiyat, therefore, having sold a part of his occupancy holding cannot surrender the *self same* part to his landlord so as to entitle the latter to take *khas* possession of the said part by ejecting the purchaser." And on these grounds his Lordship differed from the two leading decisions in which

Raiyat cant'
surrender
transferred
portion.

Landlord
cant' eject
purchaser.

¹ *Kunja v. Bama*—43 Cal. 878. *Tamij v. Brajendra*—22 O.W.N. 967—*Zamir v. Bissesarwari*—25 C. L. J. 480 per Newbould J.

the contrary view was taken.¹ Mookerjee J. also in an earlier case doubted the correctness of the contrary view of the law and criticised adversely one of these leading cases.²

If this view of the law is correct, the landlord is not entitled to eject the part-purchaser, even if he gets from the raiyat the *surrender of the remaining portion* of the holding. For, though the surrender of the part of the holding not transferred is valid, so also the sale of the other part of it. And the raiyat has no right to surrender the portion he has already transferred. And, according to F.B. decision, the landlord cannot get *khas* possession of the holding by ejecting the purchaser as the entire holding is not and cannot be surrendered. So also on the surrender of remainder.

The landlord cannot complain that an undesirable person is forced upon him as a tenant for it is his own action in accepting the surrender which brings him into direct relation with the purchaser. To hold otherwise would be to hold out a premium to fraud, as it would enable the tenant to pocket the purchase-money and deprive the purchaser of his purchase by a mere trickle and the remedy of the purchaser against his vendor may be quite illusory. As Teunon J. points out:—"There can be no suggestion here that the landlord was himself deceived by the original tenant and the *landlord accepted the surrender with full knowledge of the prior sale*. And if fraud and conclusion on the part of the landlord is essential, such knowledge would be sufficient to deprive him of the right to evict. But if the landlord took nothing by the surrender *fraud collusion, or knowledge on the part of the landlord becomes immaterial*?"³

With regard to the arrangement already referred to by which the raiyat on transferring a portion surrenders the whole or a portion of the holding to the landlord and gets a *resettlement* from him, it may be observed that such arrangement is more often than not, *collusive*, done with the object of defrauding the purchaser, and therefore ought to be looked upon with a suspicious eye. Where a raiyat, though he has transferred a portion of the holding and surrendered Resettlement with raiyat

¹ *Zamir v. Bisseswari*—25 C.L.J. 480 per D. Chatterjee, J. differing from *Tomizuddi v. Khoda*—11 C.L.J. 16 = 14 C.W.N. 229; *Romani v. Kalimuddi*—17 C. W. N. 1101. *Ananda v. Gurudayal*—22 C. W. N. 965 L. P. A. per Mookerjee and Woodroffe JJ. *Dastur v. Ram*—22 C. W. N. 972 per Teunon J.

² *Askar v. Gopi*—18 C. L. J. 25 = 18 C. W. N. 601 dissenting from *Tomizuddi v. Khoda*—11 C.L.J. 16 = 14 C.W.N. 229.

³ *Dastur v. Ram*—22 C.W.N. 972 following *Ananda v. Gurudayal*—22 C.W.N. 965; *Askar v. Gopee*—18 C.L.J. 257 = 18 C.W.N. 601, *Hasuni v. Sadir*—30 I.C. 252; *Raghunath v. Cox H*—19 C.W.N. 268.

often collusive.

the whole of it in favour of the landlord, is yet *found, notwithstanding the surrender, in occupation of the remaining lands* of the tenancy, Mookerjee, J. held:—"In our opinion {there is no room for doubt that the alleged surrender was *collusive*. If the surrender was collusive the *tenancy of the original raiyat has not yet terminated*, and so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding."¹ So where the purchaser in execution of a money decree of a non-transferable occupancy holding, being resisted by the raiyat, by an arrangement with the latter, was given a portion of the holding, the raiyat retaining the rest; and subsequently the raiyat surrendered the whole holding to his landlord, though it appeared that *even after such surrender he went on occupying the portion retained by him under the arrangement. Held*—that the surrender being obviously illusory—not being real but pretended, the original tenancy subsisted and protected the purchaser from ejectment by the landlord.²

¹ *Askar v. Gopi*—18 C. L. J. 257=18 C. W. N. 601.

² *Naba v. Dhananjoy*—20 C.W.N. 610.

IX. *Who can question transferability?*

It follows from what has been stated above that the question of transferability is one which may be raised by the landlord and by his representatives in interest ¹. A sale in execution of a money decree of an occupancy holding not transferable by custom is valid and effectual, if the sale is held with the consent of the landlord ², or if a settlement is made by the landlord with the purchaser as soon as can be reasonably expected after the sale. ³ When, therefore, the plaintiff had purchased such a holding with the consent of the landlord, the question whether the holding was transferable by custom or usage without the consent of the landlord did not properly arise ⁴.

Who can question transferability?

'16 Annas' Landlord and his representative.

Where the *si-teen-annas* landlord himself purchases a non-transferable occupancy holding he is not thereby precluded from raising the question of its non-transferability against other transferees of the holding from the tenant himself⁵. And it makes no difference whether the landlord purchases the holding at a private sale from the raiyat or at a sale in execution of a decree against him. Thus where in execution of a money decree the landlord of a non-transferable occupancy holding purchased it, after it was mortgaged by the tenant in favour of a third party, and in a suit by the mortgagee to enforce the mortgage in which the landlord was made party defendant, it was argued that as the landlord by his purchase only purchased what the mortgagor (tenant) had to sell, *viz.*, the equity of redemption, he was in the place of the mortgagor and so cannot in equity resist the claim of the mortgagee. Their Lordships in overruling the argument observed:—
“We are of opinion that the English law of mortgage is not applicable to this case. The law of estoppel in force in this country is contained in S 115 of the Evidence Act. The (landlord) is clearly not estopped from pleading and

Where he is himself transferee.

No Estoppel.

¹ *Rahim v. Iman*—17 C.L.J. 17.

² *Annandu v. Ratnakar*—7 C.W.N. 572 but contra in *Bhiram v. Gopi*—24 Cal. 355. See also *Badarannessa v. Alam*—27 C.L.J. 650=19 C.W.N. 814.

³ *Dwarika v. Tarini*—5 C.L.J. 289=34 Cal 199=11 C.W.N. 573.

⁴ *Bibijan v. Kishori*—11 O.W.N. clxx: see also *Gaurhari v. Kasim-uddin*—4 C.W.N. 557: *Durga v. Keramat*—7 C.W.N. 697.

⁵ *Asmatannessa v. Harendra*—8 C.L.J. 29=12 C.W.N. 721=35 Cal 704.

Two-fold character of landlord and purchaser can not be split up.

proving * * * that the *jotes* are not transferable without their consent." ¹ "No doubt"—as pointed out in an earlier case, "if the question was between the assignee of the interest of the tenant and the landlord, the plaintiff could not recover without proving that (it) (the holding) was transferable according to custom or usage". In a suit on a mortgage in favour of the plaintiffs of certain *jotes* mortgaged by the tenant, the landlords to whom some of the mortgaged *jotes* had been assigned, were made defendants as being entitled to redeem, and they set up the defence that the mortgage was invalid as against them, because they were landlords of the property and the mortgaged *jotes* were non-transferable; the plaintiffs contended that as they (the landlords) were made party only in their *character as assignees* of the mortgagor's interest, they were not entitled to raise the question. Banerjee J. observed :—"But the argument overlooks the fact that these defendants have become assignees of the mortgagor's interest because they have by implication consented to the transfer in their favour. If the transfer had been made to a stranger without this consent, such a transfer, if the defence of the defendants be well-founded, could not have been valid. Therefore, even as assignees of the mortgagor's interest the defendants did not appear in their sole character as persons deriving title from the mortgagors. But their other *character as landlords is necessarily mixed up with their character as assignees to make the assignment in their favour valid. It is impossible, therefore, to split up the legal character of the defendants (landlords) in the way we have been asked to do*"². Therefore the defendants (landlords) were allowed to raise the question of transferability of the holding.

Not so when he is co-sharer landlord.

The position is different when a *co-sharer landlord is the purchaser*. As pointed out in a later case,³ a co-sharer landlord who has purchased a non-transferable occupancy holding, is a purchaser without the landlord's consent, using the term landlord in its proper signification of the whole body of landlords"⁴. The fact that the purchasers are co-sharer landlords does not put them in a better position than a stranger purchaser would be⁵. In a suit by a mortgagee-purchaser of such a holding, in which a co-sharer

¹ *Ayenuddin v. Shrish*—11 C.W.N. 76.

² *Hare v. Robert*—8 C. W. N. 365, see *Durga v. Karamat*—7 C. W.N. 607.

³ *Ayenuddin v. Shrish*—11 C. W. N. 767.

⁴ *Hara v. Umesh*—11 C. L. J. 20=14 C. W. N. 71.

⁵ *Lala v. Bateswar*—32 Ind Cas 1003=23 C. L. J. 559.

landlord, who had purchased it in execution of a decree of his own, was made a party defendant, it was *held* that he could not raise the question of non-transferability of the holding. "He would never have been made a party to this suit, if it had not been for his purchase. But he is defending the suit not as a purchaser but under the original title as a co-sharer landlord which is not questioned in the suit at all". And, assuming, though not admitting, that he might conceivably resist the plaintiff's claim so far as it affected the *extent of his interest as a landlord* in the lands in suit, we think that the ruling cited ¹ is a clear authority that he cannot resist the plaintiff's *whole claim* which is the only question raised in this suit" ². Similarly, where the co-sharer landlord purchasing the holding in execution of a decree for his own share of rent, which, before the amendment of the Act, was regarded as a simple money decree ³. It makes no difference if the defendant is a tenant who claims under a lease from a co-sharer landlord ².

In a suit to enforce his mortgage by the *mortgagee* of a non-transferable occupancy holding *against co-sharer landlords* who, since the date of the mortgage, purchased the holding in execution of a decree for their rent, the question of transferability does not arise. ⁴ Such is also the case where the co-sharer landlord purchased the holding in execution of a money decree. ⁵ For under the Bengal Tenancy Act a decree obtained by a co-sharer landlord *re* his share of the rent is simply a money decree.

As between the transferor (raiyyat) and the transferee no question of transferability can be raised, because the transferor is bound by the doctrine of estoppel not to question the title of his transferee. When a non-transferable occupancy holding is sold by a tenant by a *kobala*, he is, *as between himself and the transferee*, estopped from setting up the invalidity of the sale by him ⁶. So also in the case of a mortgage ⁷.

As between
transferor &
transferee.

¹ *Ayenuddin v. Shrish*—11 C. W. N. 76.

² See above: But contra in *Achunulla v. Salimonnessa*—9 C. W. N. XXIV.

³ *Rukmini v. Nilmani* :—19 C. W. N. 1309 see also *Hara v. Umesh*—11 C. L. J. 20=14 C.W.N. 71.

⁴ *Chandi v. Gour*—19 C. W. N. 1307.

⁵ *Hara v. Umesh*—14 C. W. N. 71=11 C.L.J. 20.

⁶ *Bhagiratha v. Hafizuddin*—4 C. W. N. 679, followed in *Shyama v. Mokshada*—13 C. L. J. 481, referred to in *Ayenuddin v. Shrish*—11 C.W.N. 76; *Ram v. Jawahir*—12 C. W. N. 899=7 C. L. J. 72. *Hari v. Uday*—8 C.L.J. 261=12 C.W.N. 1086.

⁷ *Krishna v. Bhairab*—2 C. L. J. 19n: *Ram v. Jawahir*—7 C. L. J. 13=12 C. W. N. 899.

As between
purchaser &
co-sharer.

But it was held in a case that where a share of an occupancy holding is transferred the other *co-sharers* in it can question the validity of the transfer in a suit between the purchaser and themselves for joint possession, even though the landlord is no party to the suit, there being no room for the application of the doctrine of estoppel in such a case ¹.

As
between rival
claimants
deriving title
from tenant.

In cases between *rival claimants* (both of whom derive their title from the tenant), neither of whom is the landlord nor the original tenant, the question of transferability does not arise, and the one who would have the best title if the holding were transferable is entitled to succeed. Thus, where two parties claim an occupancy holding under the original owner (the *raiyat*),—the plaintiff by right of *inheritance* and the defendant under a deed of *transfer*,—it is not open to the plaintiff to contend that the deed did not take effect in respect of the occupancy holding because it was not transferable by custom.² That is a question which only the landlord or his representative-in-interest is competent to raise³. Similarly as between *mortgagee* and *purchaser* of equity redemption from the mortgagor, the original tenant, the purchaser cannot be heard to say that his transferor had not a right to transfer the holding or to transfer his rights therein. A *transferee* cannot be heard to say that his transferor had no right to transfer the holding⁴.

e.g. heir &
transferee.

Mortgagee &
purchaser.

Auction
& private
purchaser.

A *purchaser at an execution sale* is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of a greater advantage⁵. An execution-purchaser of a non-transferable occupancy holding *in execution of a money decree* cannot raise the question of the validity of a transfer by the debtor in favour of a third party⁶. Such a transfer is operative against a subsequent purchaser of the holding in execution of a money decree against the *raiyat*⁷. Similarly the question of transferability does not arise in a suit between the *mortgagee-purchaser* of the

¹ *Agarjan v. Panaulla*—12 C.L.J. 169=14 O.W.N. 779=37 Cal., 687. Not overruled by F.B. in *Dayamayis* case on this point.

² *Ayenuddin v. Srish*—11 C.W.N. 76 *Sumiruddin v. Bengu*—13 C.W.N. 630.

³ *Rahim v. Iman*—17 C.L.J. 173=15 Ind Cas 698.

⁴ *Jamahir v. Nazir*—18 C.L.J. 512.

⁵ *Debendra v. Mirza*—10 C.L.J., 150.

⁶ *Kanchan v. Kamala*—21 C.L.J. 441.

⁷ 32 Ind. Cas. 1003.

interest of the tenant and the *private purchaser* from the same person¹. A purchaser from the raiyat *after a decree* for sale has been passed in favour of a mortgagee of the holding but *before the sale* thereof is bound by the sale both on the ground of estoppel as well as of *lis pendens*.¹

Where the question was who as between two successive transferees of an occupancy holding not transferable by local custom or usage, was entitled to the surplus sale-proceeds of the holding after satisfaction of a rent decree obtained by the landlord, it was held that the earlier transferee was so entitled and that as the landlord was no party to the suit and it did not matter to him which of the two claimants got the money, the question of transferability cannot properly arise². Where the question of non-transferability was raised between two rival purchasers of an occupancy holding, one being a purchaser of the holding at a sale in execution of a mortgage decree in his own favour, the other being a purchaser at a sale in execution of a decree for rent obtained by a co-sharer landlord, the purchase of the latter was subsequent to the former. It was held that the question of non-transferability of the holding could not be raised between such parties, and that the subsequent purchaser took the holding subject to the rights acquired by the prior purchaser³.

Where purchasers of non-transferable occupancy holding sued to recover possession of the holding from persons who were in possession apparently without title, (*i.e. trespassers*), and the defendants resisted the action on the ground that the holding being not transferable, the plaintiffs had no valid title to the holding and were not entitled to recover possession: it was held that the question of nontransferability was one which could not be raised by the defendants who were *trespassers* and that the plaintiff had right to be protected in the enjoyment of his purchase against all the world except possibly the landlord⁴.

But in a suit brought for the enforcement of a mortgage of a non-transferable occupancy holding

Priority as between them.

Between purchaser and trespasser.

¹ *Shyama v. Makhada*—15 C.W.W. 703=13 C.L.J. 481.

² *Ambika v. Aditya*—6 C.W.N. 624.

³ *Aynuddin v. Srish*—11 C.W.N. 76 followed in *Samiruddin v. Banga*—13 C.W.N. 630. *Tulshi v. Dayal*—15 Ind. Cas. 718 *Haro v. Umesh* 14 C.W.N. 71=11 C. L. J. 20.

⁴ *Basarat v. Sabulla*—2 C.W.N. colxxix; *Narain v. Dinabandhu*—9 C.L.J. 82.

a Between recognised

and un-
recognised
purchasers.

purchaser of a portion of the holding from the mortgagor, although he *previously obtained the landlord's consent to the transfer and subsequently obtained a fresh settlement* from him, is estopped from pleading the invalidity of the mortgage on the ground of the non-transferability of the holding. The purchaser is a "*representative*" of the mortgagor within the meaning of S 115 of the Evidence Act. As neither the mortgagor alone, nor the landlord by his own act and without the concurrence of the mortgagor, could confer any title on the purchaser as to the portion of the holding transferred, but the two joined to pass such a title as he acquired, and as the mortgagor was bound by his deed of mortgage not to assert against the mortgagee that he had no right to mortgage, the purchaser who derived his title at least in part from the mortgagor, cannot be allowed to make a like assertion¹. So the question of non-transferability of occupancy holding cannot be raised by the purchaser of a holding pending a suit on a mortgage on the same, even though he had obtained *recognition* from the landlord during the pendency of the mortgage suit, in a suit between the mortgagee purchaser and himself². But where the *entire* non-transferable occupancy holding is transferred, the tenant having no concern with the land, the purchaser acquires no title by his purchase which the landlord can be called upon to recognise. It may be that by the application of the doctrine of *estopped* the vendor or persons deriving title from him might be *estopped* from raising the question of the validity of the transfer. But, in so far as the superior landlord is concerned, he is entitled to *ignore the transfer*. Consequently he is free to create a new tenancy in favour of another. A subsequent transferee of a *portion* of a non-transferable occupancy holding who pays rent to the landlord and is *recognised by him as a tenant is a representative of the landlord*, for he did not acquire any title by his purchase, and, if he has any title at all it must be attributed to one source only, namely, the superior landlord. And as such he is not *estopped* from raising the question of non-transferability of the land in a suit by inferior transferee from the tenant for possession³.

Of whole or
part of
holding.

¹ *Radha v Ramananda*,—15 C.L.J. 370=16 C.W.N. 475=39 Cal. 573.

² *Shyama v Mokshada*—13 C. L. J. 487=15 C.W.N. 703.

³ *Madhu v Kali*—25 Ind. Cas. 300, distinguishing *Radha v Ramananda*—15 C.L.J. 698=39 Cal. 513=16 C.W.N. 475. See F.B. ruling in *Dayamayi's* case already referred to.

But where the plaintiffs who had purchased certain *shares* in a non-transferable occupancy holding partly in execution of a mortgage decree against a co-sharer tenant and the rest by private alienation from another and obtained *recognition from some of the co-sharer landlords*, having sued for partition, the sons of one of the former opposed the suit on the ground that they had been recognised as tenants of the whole holding *by some of the co-sharer landlords*. *Held*—that the plaintiffs are entitled to all the interests they purchased from their vendors, and that no question of transferability of the holding arises in this case as between the plaintiffs on the one side and the heirs of their vendors on the other, nor would such a question arise between them and the co-sharer landlords. It seems to follow that it does not arise between them and persons who may have obtained *recognition from some co-sharer landlords* and are not representatives of “landlords” when that term is used in its proper sense as meaning the whole body of landlords. And certainly it cannot arise in a case like the present where the mortgagor’s family claim to remain in possession against their mortgagee by reason of an alleged recognition by a fractional portion of the “landlords.”¹

Recognised
by co-sharer
landlord.

When an application is made to execute the decree for money by the attachment and sale of an occupancy holding the judgment-debtor (*i.e.* the raiyat himself) is entitled under 244 C. P. C. '82 (= 47 C. P. C. '08) to raise the question whether the holding is saleable by custom or usage, and to have that question determined by the court executing the decree.²

As between
decree-
holder and
judgment-
debtor.

In the case of an *involuntary sale* at the instance of a third party, a creditor, to which the landlord consents it is open to the tenant to raise the question of non-transferability. The point has already been fully discussed.

The confirmation of sale is no bar to an application by the judgment-debtor, tenant, to have it declared that in execution of a money decree the property attached could not be sold, that he had no disposing power over it, and that the sale passed no interest to the purchaser, and the enquiry which would have to be made upon an application like this, would be an enquiry under the provisions of S244 uncontrolled by, S311 & 312 C. P. C. '82 (= S47, 021rr

Confirmation
of sale no
bar to such
objection.

¹ *Rajab v. Dina*—19 C. W. N. 1305.

² *Majid v. Raghubar*—27 Cal. 187.

Knowledge
if bar.

8990).¹ But where after a judgment-debtor with full *knowledge of the execution proceedings* and full opportunity of raising an objection to the effect that the holding is an occupancy holding and non-transferable, fails to raise that objection at the time of the sale, it is not competent to him to resist the purchaser after the confirmation of the sale, and, as between the purchaser and the judgment-debtor, the title to the property vests in the purchaser on the confirmation of the sale.² But if the judgment-debtor is not aware of the proceedings in attachment or in connexion with the sale of the property he cannot be said to be a party to the order of sale and can therefore question its propriety.³

¹ *Durga v. Kali*—3 C. W. N. 586=26 Cal. 727 referred to in *Gahar v. Kasimuddi*—4 C. W. N. 577=27 Cal. 415 followed in *Murullah v. Burullah*—9 C. W. N. 972.

² *Dwarikanath v. Tarini*—5 C. L. J. 294=11 C. W. N. 513=35 Cal. 294 confirmed by F. B. in *Dayamajis* case.

³ *Durga v. Kali*—3 C. W. N. 586=26 Cal. 727 confirmed by F. B. in *do*.

X. *Right of Transferee to set aside Execution Sale.*

The question whether a person who has purchased from a raiyat the whole or a portion of the occupancy holding which is not transferable by local custom or usage, is entitled to apply under S. 244 (and under S. 310A, S. 311 C. P. C., '82=S47 and O21, r 89 and r 93 C. P. C. '08) to have a sale of the holding in execution of a decree for arrears of rent obtained by the entire body of landlords set aside depends on the question whether he is a *representative of a party to the suit*, which depends on the further question whether he has an *interest in the judgment debtor's property which is affected by the decree*.¹ It is clear enough that if he has purchased any interest of the judgment-debtor, that interest *is bound by the decree*, and he is so far a representative of the judgment-debtor and is entitled to apply under S 244 C.P.C.'82=S 47 C. P. C.'08. The question therefore narrows itself down to this, *namely*, whether he can be said to have purchased *any interest at all* in the property. There is of course authority for the view that a *purchase, such as this, conveys nothing*.² If this view is sound he can not be regarded as a *representative* under S 244' C.P.C. 82=S 47 C.P.C. '08 inasmuch as if he bought no interest he has no interest to be affected by the decree. In this view a *mortgagee* of the holding was held not entitled to apply under the section.³ On the other hand, it seems to have been held by necessary implication in the following cases⁴ that such a *purchaser acquires a good title* against his vendor and persons claiming through him, and it has been held further that a transfer of a *portion* of an occupancy holding not transferable by local custom or usage does not entitle the landlord to re-enter on the portion so transferred.⁵ In view of these authorities, though they were not expressly referred to, it has been held that a purchaser of a *portion* of an occupancy holding, whether transferable

Is he entitled to apply to set aside Execution sale ?

(i) Under §47 C.P.C.'08 =§244 C. P. C.'82.

Conflict of authority.

¹ *Ishan v. Beni*—24 Cal. 62.

² *Bhram v. Gopi*—24 Cal. 355 : *Kularp v. Gillanders*—26 Cal. 615 : *Sadagar v. Krishna*—26 Cal. 937.

³ *Nissa v. Radha*—11 C. W. N. 312 a case of mortgage : There is real distinction between sale and mortgage in this respect but it refers generally to all transfers.

⁴ *Bhagirath v. Hafizuddin*—4 C. W. N. 679 : *Ambika v. Aditya*—6 C. W. N. 624 : *Ayenuddi v. Srish*—11 C. W. N. 76

⁵ *Kabil v. Chandra*—20 Cal. 690 : *Durga v. Doula*—1 C. W. N. 160 : *Guzaffar v. DalGLISH*—1 C. W. N. 162.

Settled by
F.B.

or not, is entitled to apply "under S 310A C.P.C.'82¹ (=021r 89 C. P. C. '08) and therefore under S. 244 C. P. C. '82² (=47 C. P. C. '08). The words in both S. 310A and 311 (C. P. C. '82=021r 89 and 90 C. P. C.'08) are "*persons whose immovable property has been sold,*" and the whole point is whether the purchaser can be said to have *any property at all in the holding*. If these decisions are correct it follows that he is "a person whose immovable property has been sold" under S. 310A and 311 C. P. C. '82 (=021r 89 and 90 C. P. C.'82) and is a *representative of the judgment-debtor*" under S. 244 C.P.C.'82(=S. 47 C. P. C.'08)³ There was thus a real conflict of authority,⁴ and the matter was referred to a Full Bench which has recently held that a non-transferable occupancy holding can be transferred and that therefore such a purchaser is '*a person whose immovable property has been sold*' and is a '*representative of the judgment-debtor*' (the raiyat) within the meaning of those sections and rules.⁵

(ii) Under
S174 B T.
Act.

But, so far as Bengal proper is concerned, the Bengal Tenancy Act provides that *after* the sale it is only the *judgment-debtor* who has the privilege of having the sale set aside by paying up the decretal amount, costs etc.⁶. And the term "*judgment-debtor*" has been interpreted strictly as referring to the judgment-debtor alone *i.e.* a person against whom the decree under execution has been obtained, and as not including a *transferee* or *assignee* from the judgment-debtor⁷.

¹ Omar v. Basiruddin—7 C. L. J. 282: following Kunja v. Sambhu—8 C. W. N. 232: Bunsidhar v. Kedar—1 C. W. N. 114.

² Asgar v. Asabuddin—9 C. W. N. 134.

³ Referring judgment of Cox and Doss JJ. in 18 C. W. N. 971 F. B. (972)=20 C. L. J. 52.

⁴ In support of the affirmative see the following.—Kabil v. Chandra—20 Cal. 590: Bunsidhar v. Kedar—1 C. W. N. 114: Durga v. Doula—1 C. W. N. 160: Guzaifar v. Dalglis—1 C. W. N. 162: Bhagirath v. Haksuddin—4 C. W. N. 679: Pares v. Nobe—5 C. W. N. 821 F. B.=29 Cal. 1 F. B. Ambika v. Aditya—6 C. W. N. 624: Kunja v. Sambhu—8 C. W. N. 232: Asgar v. Asabuddin—9 C. W. N. 134: Ashok v. Karim—9 C. W. N. 843: Gopi v. Sajani—10 C. W. N. 240: Ayenuddi v. Srish—11 C. W. N. 76: Omar v. Basiruddin—7 C. L. J. 282: Haradhan v. Grish—13 C. W. N. 98=8 C. L. J. 327: Ali v. Ramjan—13 C. W. N. 224. And in support of the negative see the following:—Bhiram v. Gopikanta—24 Cal. 355: Kuldeep v. Gillanders—26 Cal. 937: Binodini v. Peary—8 C. W. N. 55: Nissa v. Radha—11 C. W. N. 312: Asiruddi v. Mokshadamoyi—12 C. W. N. 434=35 Cal. 543: Prassanna v. Bama—13 C. W. N. 652. Nalini v. Fulmani—16 C. W. N. 421=15 C. L. J. 388 (where the conflict is noticed). The Full Bench therefore must be held to have overruled the last set of cases.

⁵ Dayamayi v. Ananda—18 C. W. N. 971 F. B.=20 C. L. J. 52

⁶ Act VIII of 1885' S 174.

⁷ Nalini v. Fulmani—15 C. L. J. 388=16 C. W. N. 428: Rajendra v. Phudi—15 Cal. 482.

This presented no practical obstacle to the setting aside of the sale and was no hardship to any one, because the *decreeholder (landlord) could always be compelled to take the money whoever paid it, by the simple device of paying the amount in the name of the judgment-debtor*¹.

But the provisions of 310A C. P. C. 82 (=Or 89 C. P. C. 08), which allowed *third parties* to have an execution sale set aside on depositing the decretal amount &c, were however extended to sales in execution of rent-decrees by some of the rulings of the High Court² (now confirmed by the recent Full Bench decision) which, being much wider than those of S 174 B. T. Act, practically superseded them. This led to anomalous result. For, it enabled a wider class of *persons than the defaulting tenant (judgment-debtor)*, including the *unrecognised transferee* from him, to have the sale set aside by making the required deposit within the specified time, and forced the landlord (decreeholder) to take the money from a person whom he might not wish to recognise as his tenant, and gave rise to long-protracted and expensive litigation, during which the landlord did not know who his tenant was—whether he was the old tenant (i.e. the judgment-debtor) or the auction-purchaser, whom he should sue for rent, and might sue the wrong person and some of his lawful demands might consequently become barred by limitation³. Whatever might be the correct view of the law before, S 310 A C.P.C. '82 (=O 21 r 90 C.P.C. '08) has now been expressly excluded from Bengal proper and Behar by Act I of 1907 B.C., and the proposition that an application for setting aside the sale can now be made by the *judgment-debtor alone and by no other person is now good law* so far as these parts are concerned⁴. Hence the deposit made by a transferee of the judgment-debtor is now no deposit under the law in force in Bengal and Behar, and the sale should not be set aside.⁵

(iii)
Under 310 A
C.P.C.'82=21
r89 C.P.C.'08.

In Bengal
proper.

The considerations stated above did not, however, carry any weight with the late Government of East Bengal and Assam which thought it proper not to do away with the rights

Different law
in E. Bengal.

¹ Notes on the clauses to the Bill of 1906 to amend B.T. Act.

² *Omar v. Basiruddin*—7 C.L.J. 282 *Banshi v. Kedur*—I.C.W.N.114 : *Kunja v. Shambhu*—8 C.W.N. 234 *Benodini v. Peary*—8 C.W.N. 55 (Part-purchaser) contra in *Prasanna v. Bama*—13 C.W.N. 652 : *Nissa v. Radha*—11 C.W.N. 312 which are now overruled by F.B. in *Dayamoyi's case*—18 C.W.N. 972=20 C.L.J 52 F.B. The conflict is noticed in *Nalini v. Fulmani*—16 C.W.N. 421=15 C.L.J. 388.

³ Notes on the clauses of the Bill of 1906 to amend B.T. Act.

⁴ *Ranjit v. Jogendra*—16 C.L.J. 546.

⁵ *Surendra v. Luchmi*—43 Cal 100.

of third parties, such as unrecorded tenants and other persons, whose interests are affected by the sale. The Select Committee there pointed out that "the former tenant and the landlord might collude with the result that an *unregistered transferee* may be defrauded, and that in other cases also fraud may be practised upon *unregistered tenants*. And, if the right to deposit the decretal amount and have the sale set aside be taken away from such persons, grave hardship and injustice might be caused"¹ S 310 A.C.P.C. '82 (= O 21 r 89 C.P.C. '08) is, therefore, still applicable to rent sales in East Bengal. And to meet the inconveniences to the landlords already stated, such as have been pointed out by Coxe J. in the case referred to below,² it is distinctly provided that "the withdrawal of the amount deposited" by the landlord "shall not operate as an admission of the transferability of the holding sold".³ Therefore notwithstanding the withdrawal it is open to him to contest the validity of the transfer.

When land
lord in auction-
purchaser.

But even there it has been held that the above provision does not debar the *landlord, when he has himself purchased the holding* at a sale held in execution of a decree for arrears of rent due there-on, to *challenge the right of the purchaser* of the holding (who has not been recognised by him) to make the deposit on the ground that, as against him, such purchaser has acquired no title and therefore cannot come under O XXI r. 89 C.P.C. '08. Such a purchaser acquires a title to the property so long as the landlord does not choose to enter on the holding. As against the landlord, therefore, he cannot acquire any title to the property. And if it is the landlord himself, who is purchaser at the sale sought to be set aside, and who would, in ordinary course, obtain possession of the holding, though as purchaser, and who insist, upon his right to refuse to recognise the title of the purchaser under his purchase and resists the application to have the sale set aside, the purchaser is brought face to face with the landlord. Under these circumstances he cannot be said to be a person either "*owning*" the property or "*holding an interest*" therein by virtue of a title acquired" before the rent sale as against the landlords. His application, therefore, to have the sale set aside on depositing the decretal amount &c. should not be allowed and the landlord driven to eject him as a trespasser. Such a purchaser therefore cannot apply under O XXI r. 89 C.P.C. '08 to set aside a sale held in execution of a rent

¹ Report quoted in Rampini's B.T. Act, 4th Ed. 531-532.

² In *Nalini v. Fulmani*—15 C.L.J. 388 = 16 C.W.N. 421

³ E.B. & A. Act I of 1917, S. 170 (4).

decree in which the landlord himself purchased the property¹.

But where the holding is purchased by a *third party*, and not the landlord, at a sale held in execution of a rent decree, such a purchaser has the right to apply under the said rule. It has been held in the recent Full Bench case that a right of occupancy which is not transferable by custom or local usage, can be transferred and that the transfer is operative against all persons other than the landlord where it is operative against the raiyat². The effect of the sale is to give the auction-purchaser the right to oust the transferee and it has been held that that fact makes the interest of the purchaser one that is *voidable* on the sale³. He is therefore competent to make the deposit.

When third party auction purchaser.

(iv)
under § 311
C.P.C. '82=
O 21r 90
C.P.C. '08

The language of OXXI r. 89 C.P.C. '08 is not the same as the language of OXXI r. 90. The words of r. 90 "*whose interests are affected by the sale*" are very wide—much wider than the corresponding words of r. 89—and in the opinion of the learned judges of the Calcutta High Court:—"it is impossible to say that a *mortgagee* (for instance) "does not come within the rule. For one thing he is interested in the sale proceeds, being clearly *entitled to any balance of the sale proceeds* remaining over after the landlord's dues have been satisfied. It seems to us that his *interests are clearly affected by the sale* which he seeks to set aside. So the purchaser of an *entire* non-transferable holding at a sale held in execution of a mortgage decree is entitled to apply to have the sale subsequently held by the landlord in execution of a rent decree set aside⁴. The transferee of a *portion* of a non-transferable occupancy holding can come in under OXXI r. 90 C.P.C. '08, (=S 311 C.P.C. '82) to set aside a sale by the landlord in execution of a rent decree against the recorded tenant as he is a person whose interests are affected by the sale.⁵ The rule formulated by OXXI r. 90 C.P.C. '08 has also a wider scope and is of more comprehensive character than the rule laid down in Sec. 311 C.P.C. '82⁵ which it has superseded.

By mortgagee.

By transferee of whole.

By part purchaser.

¹ *Abdur v. Promode*—22 C.L.J. 108=20 C.W.N. 40. [Purchaser of whole holding in East Bengal where it applied].

² *Dayamayi v. Ananda*—20 C.L.J. 52 F.B.=18 C.W.N. 971

³ *Tarak v. Haris*—16 C. L. J. 548=17 C. W. N. 163 [without any decision as to whether transfer was binding on the landlord or not].

⁴ *Sailabala v. Nrittya*—22 C.W.N. 143 [Purchaser of whole holding in East Bengal] also per Mullik J. in *Mahadeo v. Langat*—2 P. L. J. 457 S. B (473).

⁵ *Abdul v. Tafazuddin*—19 C.W.N. 326 [which was decided before the F.B. decision in *Dayamayi's* case]. But *contra* in *Nissa v. Radharani*—11 C.W.N. 312; *Prasanna v. Bama*—13 C.W.N. 652, *Nalini v. Fulmani*—16 C.W.N. 421 [all decided before F.B. decision in *Dayamayi's* case which has altered the law in some respects—vide per Mullik J. in *Mahadeo v. Langat*—2. P. L. J. 457 (470)].

XI. *His right to deposit claim to prevent sale.*

Under S. 170 B. T. Act of a judgment-debtor has been advertised for sale in execution of a decree for rent, the *transferee of the* (whole of an) occupancy holding, whose name has not been registered in the books of the landlord and who has in no way been recognised by him, (as a tenant) is a person, who, within the meaning of S170 (3) B. T. Act, has in the holding an *interest voidable on the sale* so as to enable him to apply to stop the sale, there appeared to be a considerable difference of opinion in the Calcutta High Court before the recent F. B. decision. But on grounds similar to those stated above it has been held that he can apply to *stop the sale* in execution of rent decree by paying the decretal amount under S170 (3) B. T. Act. It is possible, no doubt, to construe the phrase "*Having any interest*" in that section as having a wider application than the expression "*the representative of a party, to a suit*" under S244 C.P.C. '82 (=S47 C.P.C. '08), or *the owner of the immovable property*" under S. 310 A and 311 C.P.C. '82 (=OXXI rr. 89-90 C. P. C. '08). But as pointed out by Stephen J :—"it seems (on authority) as if the classes of persons described in these sections are all the same, as indeed there is no reason why this should not be"¹.

Purchaser of whole holding. According to the recent Full Bench decision, a non-transferable occupancy right can be transferred, subject to the qualification that "where the transfer is a sale of *whole* holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding,"². The *landlord*, therefore *can terminate the purchaser's interest at any time*, and his right to do so is *independent* of an execution sale. But, as pointed out by D. Chatterjee's J :—"We do not think however that on that account the interest is not one which is *voidable* on the sale. The effect of the sale is to give the auction-purchaser the right to oust the transferee, and it has been held in the case noted below³ that fact makes the interest of the purchaser one that is voidable on the sale". If that be so, he is entitled to deposit

¹ *Nalini v. Fulmani*—15 C. L. J. 388=16 C. W. N. 421 following *Ishan v. Beni*—24. Cal 62.

² *Dayamayis case*—20 C.I.J. 52 F.B.=18 C.W.N. 971 F.B.=42 Cal 172 F.B.

the decreetal amount under S170 (3) B. T. Act so as to avert the sale¹.

These arguments, however, did not commend themselves to Chamier C. J. of the Patna High Court who has expressed the contrary view in a very recent case² on the grounds, as stated by his Lordship, that (a) "It appears to me that the *interest voidable on the sale* referred to in S170 are those interests which are *incumbrances* within the meaning of S161. I agree with the decision of Jenkins C. J. and N. R. Chatterjee J. (of the Calcutta High Court) that such a purchaser did not hold an *incumbrance* within the meaning of Sec. 167, in as much as an absolute sale of a *portion* of the holding was not in limitation but in destruction of the interest to which it related³. *A fortiori*, the sale of an *entire* holding is not in limitation of the interest of the tenant." (b) "It appears to me with reference to the decision of the Full Bench that an unregistered transferee of an *entire* holding, who has not been recognised in any way by the landlord, acquires no interest in the holding as against the landlord, and it has been decided in several cases that when a landlord brings to sale an occupancy holding in execution of a decree for rent obtained against the occupancy tenant, the purchaser is entitled to disregard the transferee of the holding. Such a transferee, therefore, does not appear to me to have an interest "*voidable on the sale*," for before the sale takes place he has no interest in the holding which he can enforce against the landlord." And his Lordship relied upon a case⁴ decided by the Calcutta High Court⁴ before the Full Bench decision. But with regard to (a), as pointed out by Mookerjee J. of the Calcutta High Court in the case noted below :— "The expression used by the Legislature is '*interest voidable on the sale*' and not '*incumbrance voidable on the sale*' under the provisions of the 14th Chapter of the B. T. Act, and it is comprehensive and should not be narrowly construed in view of the obvious object of this provision".⁵ Regarding (b), as pointed out by D. Chatterjee J. of the same court in the case already referred to :—"The landlord can terminate the purchaser's interest at any time and his right to do so is independent of the execution sale. We do not think, however, that on that account the interest is not one which

Different views of of Patna High Court.

Only incumbrancer enlisted.

¹ *Ahamadullah v. Harkaru*—22 C.L.J. 106=18 C.W.N. c.c. xxxi.

Ahamadulla v. Proyag—20 C.W.N. 39.

² *Rameswar v. Raghunandan*—1 P.L.J. 403.

³ *Abdul v. Ahmadhar*—19 C.W.N. 1217.

⁴ *Nalini v. Fulmani*—16 C.W.N. 421.

Tarak v. Harish—16 C.L.J. 548=17 C.W.N. 163.

is voidable on the sale. The effect of the sale is to give the auction-purchaser the right to oust the transferee, and that fact makes the interest of the purchaser one that is voidable on the sale".¹ With regard to the case relied on by his Lordship it may be permissible to point out that it seems to have been, by implication, overruled by the Full Bench.

Purchaser
of part of
holding.

Views of
Patna High
Court.

The question whether the purchaser without the landlords' consent of *part* of a non-transferable occupancy holding, which has been proclaimed for sale under S 163 B.T. Act, is entitled to deposit the amount of the landlords' decree and costs under S170 (3) of the Act has recently been considered by a Special Bench of the Patna High Court. Chamier C.J. of that Court again observed (on a review of the provisions of Chapter XIV B. T. Act.) :—"It seems to me quite clear that the words "*annul*" and "*avoid*" as used in [S159-161, 163, 166-167 B.T. Act] are convertible terms, that the only *interests which are "voidable on the sale"* within the meaning of S170 are those interests which can be *avoided by means of an application under S167*, and that the only interests which can be avoided by means of such an application are the *interests defined in S161 as "incumbrances"*. The result in my opinion is that the answer to the question depends upon whether the applicant has an "*incumbrance*" as defined in S 161. In my opinion he has not. He certainly has not either a "*lien, sub-tenancy or easement*". Has he "*any other right or interest created by the tenant on his holding or in limitation of his own interest therein*"? These words refer presumably to some right or interest which is *ejusdem generis* within the opening words of the definition and not to some much larger right or interest of a different description. Upon the construction of this definition I accept what was said by Jenkins C.J. and N. Chatterjee J [in the case noted below²]. A transferee, without the landlords' consent, of a plot of land forming *part* of a non-transferable holding, may be entitled to retain possession of that plot while the tenant also retains possession of some portion of his holding, but if an execution sale of the holding takes place the holding passes to the auction-purchaser, and it seems to me that the *previous transferee of a plot forming part of that holding must give way to the auction-purchaser*; in other words, the interest of the transferee of the plot, whatever it may be, is *avoided by the sale*, and the holding passes to the auction-purchaser free from any claim on the part of the transferee. Chapter XIV

¹ Ahmadullah v. Harkaru—22 C.L.J. 106=18 C.W.N. ccxxxi.

² Abdul v. Ahmadar—19 C.W.N. 1217.

B.T. Act appears to me to be self-contained so far as the present question is concerned, and upon a construction of the various provisions contained in that Chapter I am of opinion that the applicant is not a person who has in the holding proclaimed for sale an interest which is "voidable on the sale" within the meaning of S 170".¹ Sharfuddin J in his judgment in the same case points out:—"It follows from the provisions of these sections that the *incumbrance-holders whose interests are voidable on the sale are persons who are entitled to make the deposit,*" and "in accordance with the definition of an incumbrance it seems to me clear that he is not an incumbrance-holder".¹

There has been a difference of opinion on the question in the Calcutta High Court, D. Chatterjee and Walmsley J.J. having decided in the affirmative² and Jenkins C.J. and N. Chatterjee J. having decided it in the negative³. The former view, however, has not been approved of by Mullik J. of the Patna High Court. And, so far as the Calcutta High Court is concerned, that learned Judge has, on a review of all the reported decisions of that court on the subject⁴, pointed out that "the weight of authority is wholly in favour of the view that the *protection* afforded by S. 170 and S. 173 B. T. Act is *not limited to incumbrances*. There is ample authority for the view that a *transferee* who is liable, to be ejected by the auction-purchaser after the sale, *has an interest voidable on the sale*.⁵ I have some difficulty in appreciating the

Different views of Calcutta High Court.

Whether his interest voidable on sale.

¹ *Mahadeo v. Langat*—2 P.L.J. 457.

² *Sahdeo v. Kuldeep*—18 C.W.N. c.c.xix.

³ *Mahanty v. Harkissen*—19 C.W.N. c.c.xxvi.

⁴ In principle there is no difference in this connection between a tenure and a holding. The following cases relate to *tenures*:—*Anand v. Kalika*—20 W.R. 59 [unregistered transferee of under-tenure could under S. 86 of Act VII of 1865 B.C.]. *Jatindra v. Durga*—10 C.W.N. 440 [Transferee of whole tenure allowed to deposit on ground that he had been allowed to do so on a previous occasion.] *Jugal v. Srinath*—12 C.L.J. 611 [Purchaser of part.]; *Radhika v. Rakhal*—13 C.W.N. 1175 [Purchaser of share of Darpatni]; *Brindarani v. Annada*—16 C.W.N. 94 [Purchaser before decree although not bound by decree was allowed on ground that he was so allowed before] The following cases are regarding *occupancy holdings*:—*Ashgar v. Asubuddi*—9 C.W.N. 134; *Tirakdas v. Harish*—17 C.W.N. 162=16 C.L.J. 548 *Ahmadullah v. Hakaru*—18 C. W. N. ccxxxi; *Sahdeo v. Kuldeep*—18 C. W. N. ccxix *Ahmadulla v. Pryag*—20 C. W. N. 39. The *contrary* view is taken in:—*Behari v. Fakir*—12 C.W.N. ccxxxi. *Nalini v. Fulmani*—16 C.W.N. 421=15 C.L.J. 388 [Purchaser of *whole* held debarred not because he had no incumbrance, but because he had no interest which was valid against the landlord]: *Mahanty v. Har*—19 C.W.N. ccxxvi [Point was not decided but the case was remanded for the decision whether the holding was transferable].

⁵ It will suffice to cite *Radhika v. Rakhal*—13 C.W.N. 1175 and the principle is the same whether the subject-matter is a tenure or a holding.

difference, in this connection, between a *void* and *voidable* interest. *Pes se* the sale cannot be said to avoid anything. The sale gives the auction-purchaser the right to step into the shoes of the tenant, subject to the limitations and procedure of Chapter XIV. Whether the person in possession is a transferee by purchase or an incumbrancer, the auction-purchaser cannot, on being resisted, re-enter without further recourse to law, which, in the one case, is a suit, and in the other, the special procedure under S. 167. If the person in possession is not affected by the decree¹, then *ex hypothesi* his interest is not voidable on the sale. But where he is so affected the expression '*void*' on the sale is meaningless. In fact every interest is voidable where the decree and the sale give the auction-purchaser the right to re-enter. It is true that a contrary view was taken in the case noted below², but that case has been repeatedly dissented from³ and does not not, in my opinion, correctly interpret the law. And even there the court, although expressing the opinion that the transferee had no voidable interest, granted the application to deposit because he had been allowed to deposit on previous occasions. In another case although the transferee had been in possession for over 12 years, nothing turned on this, and the court held that possession *qua* the landlord was sufficient to give an interest voidable on the sale.³ Even in the case noted below⁴, which is the sheet-anchor of the opposite view, the decision was based not on the ground that the transferee did not possess a *voidable* interest but on the ground that his *interest was not valid against the landlord*. The next question is whether the "*interest*" in S. 170 means *interest valid against the landlord* at least as regards occupancy holdings." On an examination of the decisions on the rights of the purchaser of an occupancy holding, both *before*⁵

Whether his
interest
valid against
landlord.

¹ *Brindarani v. Annada*—16 C.W.N. 94.

² *Jatindra v. Durga*—10 C.W.N. 439.

³ See *Tarakdas v. Harish*—17 C.W.N. 162.

⁴ *Nalini v. Fulmani*—16 C.W.N. 421.

⁵ The following cases are in support of the purchaser's right:—*Gajadhar v. Midnapore*—16 C.L.J. 141 [Purchaser of entire holding had right to bring suit to impeach rent sale on ground of fraud] *Brahamdec v. Ramdown*—16 C.L.J. 139 [Purchaser of part was held to have the same power] *Abdul v. Tafzal*—18 C.W.N. lxxii [Transferee of portion held entitled to come in under O 21 r 90 C.P.O.] *Ashagar v. Asabuddin*—9 C.W.N. 134 [Transferee can apply under S. 173 B.T. Act] *Tarak v. Harish*—17 C.W.N. 162—16 C.L.J. 548 [Purchaser held entitled to deposit without any decision as to whether transfer was binding on landlord or not] *Banshi v. Kedar*—1 C.W.N. 114 *Benodini v. Peary*—8 C.W.N. 55 *Kunga v. Shambhu*—8 C.W.N. 232 [Part purchaser held entitled to come in under S. 310 A C.P.C. '82] *Omar v. Basir*—7 C.L.J. 282 The following cases are against his right:—*Nissa v. Radharani*—11

and after¹ the decision in *Dayamoyis* case, his Lordship points out that the majority of the decisions of the Calcutta High Court is in favour of the proposition that though the transfer of a non-transferable holding is not binding upon the landlord, it is not a bar to the transferee's paying in the money under S. 170 B.T. Act and that the effect of the F. B. decision is that so far as the *transfer of a whole* non-transferable holding is concerned the case against his right has been *overruled* while the case in its favour has been *affirmed*. The tranferee has rights, both before and after the sale, inspite of the landlord's and the auction-purchaser's right of re-entry. Indeed, under the F.B. decision, the *transferee of a part* is in a much stronger position than the transferee of the *whole*. The F.B. have decided that the landlord can re-enter at any moment as against the *transferee of the whole*, but that in respect of a *part* he can only re-enter if the transfer effects a surrender or abandonment. If, as generally happens, in the case of a *transferee of a part*, there is no abandonment or surrender by the recorded tenant, the landlord's right of re-entry does not arise. The cases, therefore, which are in favour of the transferee of the whole apply with stronger force to a transferee of a part. And the conclusion which I arrive at is that inspite of some conflict of opinion before the F.B. decision, there was a very substantial preponderance of opinion in favour of the view that unless there is a clear provision to the contrary, (as in O21 R89 C. P. C., 08) the right of a transferee by sale—particularly the transferee of a *part* of a non-transferable occupancy holding—to avoid the sale, both *before* and *after* the sale has taken

Effect of F.B. decision.

Transferee of whole.

Transferee of part.

C W.N. 312 : *Prassanna v. Bama*—13 C.W.N. 652 [He could not come in under S. 244 or 311 C.P.C. '82] *Nalini v. Fulmani*—16 C.W.N. 421. [Not entitled to come in either under S. 244 or 311 C.P.C. '82, or S 170 (3) B.T. Act on the basis that each of the above sections contemplates an interest of the same nature, namely, one which is not valid against the landlord. This was before F.B. decision in *Dayamoyis* case, but its authority has been greatly weakened by the F.B. decision which seems, in some respects, to have altered the law.]

¹ In favour of the right :—*Sahadeo v. Kuldip*—18 C.W.N. ccxix [purchaser of part held entitled to deposit under S. 170 B.T. Act] *Ahmadulla v. Harkaru*—18 C.W.N. ccxxxi=22 C.L.J. 106. [Same] *Ahmadullah v. Prayag*—20 C.W.N. 39 [purchaser of whole held entitled to deposit under S. 170 B.T. Act.] Against the right :—*Mahanty v. Har*—19 C.W.N. clxxvi [But whether his interest was valid against landlord and what effect validity had on S. 170 not gone into and case remanded for trial of whether land transferable not] *Kali v. Sheonaravi*—18 C.W.N. ccxx [Purchaser can't come in either under S. 170 B.T. Act or under S. 310 A. C.P.C. 82 but he can come in as a representative of J.D. under S. 244 C.P.C. 82 *Abdur v. Promode*—20 C.W.N. 41 [Purchaser not entitled to come in under O. 21 and 89 C.P.C.—*Ahmadullah v. P prayag*—20 C.W.N. 39 considered but not dissented from which—till stands good.]

Independent
of validity of
his interest
against
landlord.

place, is *independent of the validity of his interest as against the landlord*. He is therefore entitled to come in under S 170 and 171 B.T. Act. Again the transferee's position as defined by the F.B. also contemplates that he should be allowed to come in under S 170 B.T. Act. S 310 A. C. P. C. '82 was withdrawn from operation in rent sales in Bengal and Bihar in 1907, O 21 of '89 C. P. C. '08 which requires that the transferee should have an interest which gives him a *title as against the landlord*, would not also protect him. The F.B. however, has held him to be competent on the ground of *material irregularity and fraud* to attack the sale under O 21 r 90 C. P. C. '08, the terms of which are wider than those of O 21 r 89. If he is a person entitled to come in under O 21 r 90, why is he not entitled to pay up *before* the sale and thus avoid the chance of further litigation? [As against this view it may be urged] that by withdrawing the money [deposited by the transferee] the landlord [may] be held to have accepted [him] as a tenant. I do not think there is any estoppel in this matter. Indeed S. 170 (4) E.B. and A.T. Act was expressly added for the purpose of making this clear.

Indeed on principle, I see no reason why the landlord should not be compelled to receive payment from the transferee. He is only interested in receiving his rent. If a transferee is allowed to acquire a mortgage lien under S.171 B.T. Act the landlord's position is in no way worse than if the recorded tenant had mortgaged the holding himself to the transferee. Why then if the landlord is bound to accept a deposit from a mortgagee by private contract, should he be allowed to refuse payment from a mortgagee who acquires his lien by operation of law? In either case an outsider is thrust upon the landlord against his will.

After all the object of giving the auction-purchaser the power to avoid incumbrances and other interests is not so much to facilitate his obtaining physical possession of the land as to improve his security for rent. So long as this security is not impaired, there seems to be no reason why he should be permitted to interfere with the tenant's right of transfer, and if he gets his rent from the transferee, he can, unless the land is being used for a purpose contrary to that of the original tenancy, have no ground of complaint. Generally speaking, the right of transfer subject to safe-guards against the subdivision of the holding tends rather to enlarge than to cut down the landlord's security."¹

¹ *Mahadeo v. Langat*—2 P.L.J. 457 S.B. Fer Mullick J. (464—475).

Similarly the *mortgagee* of a *portion* of a non-transferable occupancy holding has an interest in the holding which, if the holding is sold in execution of a rent-decree, would be *voidable* within the meaning of S. 170 (3) B.T. Act. Consequently he is entitled to deposit the money under S. 173 (3) to prevent the sale of the holding.¹ Such is no doubt also the position of a mortgagee of an *entire* holding.

Mortgagee of whole or part.

Where a person has purchased a non-transferable holding and his *purchase* has been *recognised by the landlord*, he is not entitled to make the deposit under S. 170 (3) B.T. Act, as he is not the judgment-debtor, for the decree is not made against him, nor has he any interest in the holding voidable on the sale within the meaning of the section. A decree for rent against the recorded tenant will not bind him, and any sale in execution of the decree cannot extinguish his interest². Similarly when he purchases a *transferable* holding.

Recognised purchaser of whole.

Purchaser of transferable holding.

Where the purchaser of a non-transferable holding has been *in occupation* of it for a period of *longer than twelve years*, claiming, to the knowledge of the landlord, to be the tenant of the holding, it confers on him the position of a person who has an interest in the holding which is *voidable* on the sale within the meaning of S. 170 (3) B. T. Act, and he is therefore entitled to make the deposit.² Even if the holding is *transferable* by custom, as his interest in that ease (being an adverse possession) is an incumbrance and also as the effect of the sale is to pass the holding to the auction-purchaser free of such interest, it is *voidable* on the sale³. The purchaser, therefore, in such a case also is entitled to make the deposit. It is, therefore, not material for this purpose to consider whether he has acquired an interest in a transferable holding or whether he has acquired by possession for a period longer than twelve years the status of the tenant of a *non-transferable* holding².

Purchaser in adverse possession.

No distinction between transferable and non-transferable holding.

An *unregistered co-sharer* of a holding is also entitled to make the deposit to prevent the sale when the rent decree is obtained against the registered holder.⁴

Unregistered co-sharer.

¹ *Satish v. Tufan*—24 Ind. Cas. 9.

² *Tarak v. Harish*—16 C.L.J. 548 = 17 C.W.N. 163.

³ *Chandra v. Kalipasanma*—23 Cal. 254 : *Radhika v. Rakhal*—13 C.W.N. 1175 : *Jugal v. Srinath*—12 C.L.J. 609.

⁴ *Harish v. Ram*—35 Ind. Cas. 584.

XII. Procedure relating to deposit.

Court to
decide right
to deposit.

Notice should be given to the decree-holder (landlord) as well as the judgment-debtor (tenant), if an application to deposit money under S 170. (3) B. T. Act be made by a stranger to the proceedings. If either of them contests the right of the applicant to make the deposit, the question should be decided in their presence.¹ If after the notice aforesaid the landlord asserts his title and denies the right of the applicant to make the deposit under S 171 B.T. Act, the result will be a *summary enquiry by the execution court into the question* whether the applicant had any interest within the meaning of that section.² And in passing an order under S 171 B. T. Act, allowing a person to deposit the claim, *without making any enquiry* whatever into the question whether he has or has not an interest which is *voidable* on the sale, a court acts with material irregularity in the exercise of its jurisdiction, and can be set right by the High Court in the exercise of its revisional powers.³ And, if the court determines against the applicant, he will not be allowed to make the deposit to satisfy the decree and stay the sale.² The sale will take place, and if the proceeds of the sale amounts to more than the landlord is entitled to recover, the balance will go to the applicant, for, as between him and his vendor, there can be no question that the transfer is operative.²

¹ *Ram v. Rudra*—18 C. L. J. 142=21 Ind. Cas. 409. *Bhagirath Hafiruddin*—4 C. W. 1679.

² *Barclay v. Hossein*—6 C. L. J. 601. Followed in *Gadadhar v. Midnapore*—27 C.L.J. 385.

³ *Gobinda v. Chand*—17 C. W. N. 602=16 Ind. Cas. 202. See also *Bhagirath v Hafiruddin*—4 C.W.N. 679.

XIII. *Effect of withdrawal of deposit by landlord.*

It is the duty of the landlord to challenge the title of the applicant to make the deposit under S170 (3) B. T. Act and to deny that he has any *interest* in the tenancy advertised for sale or that the interest is of a description which would be *voidable* upon the sale. If the landlord *does not dispute* the title of the depositor and withdraws the money, his silence in such a case is held to be prejudicial to the interest of the applicant (purchaser), and he is thus considered to be *estopped* from denying the latter's title, later on. If the (landlord) raises the question in the proceeding under S171 B.T. Act and if it is determined against the (applicant) he will not be allowed to make the deposit to satisfy the decree and stay the sale. The sale will take place and if the sale proceeds amount to more than what the (landlord) is entitled to recover, the balance will go to the (applicant), for as between him and his vendor, there can not be any question that the transfer is operative. The net result will be that he (the purchaser) will, at most lose the holding which he has purchased but probably recover a portion of the purchase-money. But if the (landlord) is not debarred by the doctrine of estoppel he recovers the holding. The applicant, therefore, loses the money which he has paid as consideration for his purchase and also the whole of the sum which he has deposited under S171 B. T. Act to prevent the sale of the property. There can be no possible question, therefore, that the silence of the landlord will prejudice the (purchaser). It may further be observed that such silence will probably benefit the landlord. The effect of the deposit under S171 is the satisfaction of the decree held by him. If the decree is not satisfied in this manner and if he proceeds to sell the holding he may not realise the whole of the decretal sum and there may be protracted litigation under S244 or S311 C.P.C. '82 (=S47 and Q21 R90 C.P.C. '08). If the landlord is now allowed to deny that the holding is transferable, and that the (purchaser) has acquired an interest therein by purchase, the (purchaser) is manifestly prejudiced and the (landlord) gets an advantage which can not be justified on any intelligible principle. And this is pre-eminently a case where the doctrine of estoppel should be applied. Under such circumstances, therefore, the subsequent withdrawal of the deposit by him amounts to a recognition of the transferee.¹

Landlord
estopped
from
denying
purchaser's
title.

Grounds
estopped.

Where
landlord
doesn't
object.

¹ *Barcly v. Hossein*—6 C. L. J. 601.

When he
objects.

When an application to deposit the judgment-debt under S170 (3) B.T. Act by the purchaser is *opposed by the landlord* (decree-holder) and it is *decided by the court* that the petitioner is interested in the holding, and the judgment-debt is deposited in due course and withdrawn by the decree-holder, the effect of the decision is that as between the landlord and the transferee, the transferee has acquired an interest in the holding by his purchase, and, as the landlord withdrew the sum deposited, it is no longer open to him to dispute the title of the depositor.¹ Where the question whether he is entitled to deposit the money is fought out in court, and the court holds that he is so entitled and allows the deposit to be made and strikes off the execution case as satisfied but states that *the order will not affect the jural relation between the parties*, which will remain the same as before, and the landlord afterwards withdraws the money, even then it has been held in a recent case, that the effect of the withdrawal is the recognition of the rights of the transferee as such,³ though the contrary appears to have been held in an earlier case.⁴ In that case it has been pointed out that *the protest under which a landlord receives rent deposited by the transferee of the holding, does not make the receipt non-the-less a receipt of rent from the transferee, and will operate in favour of the payor (the transferee) as a waiver of any forfeiture incurred.*² *The withdrawal by the landlord of such deposit with or without protest, therefore, amounts to a recognition of the rights of the transferee, and the landlord cannot evict him afterwards as a trespasser.*³

Withdrawal
with or
without
protest.

On similar grounds it has been held in a very recent case that *the withdrawal by the landlord of the money deposited by the purchaser under S 310A. C.P.C. '82 (= O 21 r 89 C.P.C. '08), with a view to the cancellation of the sale of the holding in execution of a decree for arrears of rent and the purchase thereof by the landlord, (after the sale was cancelled) estops the landlord from urging that the sale to the purchaser is inoperative.* Mookerjee J. points out:—"S 310A could be utilised only by a person whose immovable property had been sold. (The purchaser in his application, for making the deposit) alleged that his property had been sold at the instance of the decreeholder (landlord). If the notice of the deposit be duly given to

¹ *Jugal v. Srinath*—12 C. L. J. 509.

² *Motookdhari v. Jugdip*—21 C. L. J. 263 = 19 C.W.N. 1319 following *Kali v. Fazle*—9 Cal. 843.

³ *Jugal v. Srinath*—12 C. L. J. 609.

the decreeholder, he might and should have contended that what had been sold was not the property of the applicant, that he had not acquired a title therein by his purchase of a non-transferable holding, and that (it) was (still) the property of the recorded tenant when the sale was held, and, in that case, the question would have required decision between the applicant, on the one hand, and the landlord decreeholder, on the other. If the Court held that he *was* such a person, the matter would have been set at rest as between the parties. If, on the other hand, it was decided that he *was not* so, the matter would equally have ended at that stage; the applicant would not have parted with his money and the sale to the decreeholder would have been confirmed. But whether such notice was or was not served it is plain that the decreeholder became aware of the order for the cancellation of the sale, and when he found that a sum of money had been deposited under S 310-A. C. P. C. by one who asserted a title by purchase, he should have made enquiries and then, at any rate, he would have discovered the conveyance (in favour of the applicant-purchaser). He did not adopt this obvious course but withdrew the amount deposited in Court. It would be manifestly unjust to allow him now to take up a position directly contradictory, to what must be assumed to have been his view when he withdrew the deposited amount and to urge that the sale to the applicant was inoperative”¹.

But, as pointed out by Coxe, J.:—“If a purchaser of a holding that is not transferable, is entitled to deposit the money, what will be the use of the landlord’s resisting him, and why should the landlord be estopped from contesting the title, because he has refrained from taking action, that is bound to be fruitless? On the other hand, if the drawing of the money estops the landlord in future, what is he to do, if he desires to exercise his undoubted right of refusing to recognise the transfer? If he draws the money, he is bound to recognise the transfer. If he does not, the sale is stopped and he has to go without his rent.”²

To remove these inconveniences it has been provided in the amended Act in force in East Bengal that the withdrawal by the landlord of the amount deposited, shall

Difficulty
of landlord.

Its removal
by E. B. and
A.T. Act.

¹ *Gadadhar v. Midnapore*—27 C. L. J. 385 following *Barclay v. Hossien*—6 C. L. J. 601. *Ahmed v. Roshan*—9 I. C. 619. [At the time of the sale there was no authority for holding that the purchaser was competent to make a deposit under S. 310 A. C. P. C. '82.]

² *Nalini v. Fulmani*—15 C.L.J. 388=16 C.W.N. 421.

not operate as an admission of the transferability of the holding sold.¹

When
estoppel
does not
arise.

And it has been held by the High Court in a very recent case that in the absence of anything in the making of the deposit which would bring to his landlord's notice, the fact of the plaintiff's (purchaser's) interest, the landlord is not estopped from disputing the plaintiff's (purchaser's) right.² When a party wishes to make it known to the zemindar that he has a right to a (holding) the rent of which the landlord refuses to take from him, he should *distinctly state what is the interest he claims*, and the notice to the zemindar should comprise this information; it is not sufficient for a man wishing to protect his special interest of which the zemindar may have no knowledge, (to make a deposit of the rent in Court) *in the name of the recorded tenant* along with his own, without stating what his claim is; for unless he does so, the landlord is not obliged as to his status, and the withdrawal by the landlord of the amount so deposited does not amount to recognition.³ When a non-transferable holding is advertised for sale in execution of a decree for arrears of rent, and the *judgment-debtor put in the money* under the decree stating that he had *procured the money by selling* the holding to another person, and the landlord took the money out of court. *Held* that it could not be inferred that the landlord had given consent to the transfer, in as much as he is entitled to withdraw the money out of court without regard to the manner in which, or the source from which the judgment-debtor had procured it.⁴

When decree
by co-sharer
landlord or
money decree

Different considerations arise when the sale is held in execution of a rent decree obtained by a *co-sharer* landlord. Before the B.T. Amending Act of 1907 B.C., when the law relating to a co-sharer landlord was not considered quite settled, having regard to certain decisions of the High Court, it was the general practice to execute such decrees as ordinary money decrees (under the C.P.C.). There is a clear difference in the mode of executing decrees under the C.P.C. and under the B.T. Act. Under the latter Act, if any person *other than the judgment-debtor* having an interest in any holding wishes to pay the landlord's dues, he must do so *before* the date of the sale. He may make a deposit by inviting a decision about his interest in the property to be sold.

¹ E. B. and A. Act I of 1907, S. 170 (4).

² *Bharat v. Madhusudan*—34 Ind. Cas. 937.

³ *Mirtunjoy Gopal*—10 W. R. 466: see *Mahesh v. Maharaja*—17 C. W. N. 70.

⁴ *Robert v. Radha*—2 C. W. N. 63.

Under the C.P.C. there is no objection to the decreetal amount being paid into court by any person before the sale, and the court is not required to decide any question about his interest in the property, as provided in the B.T. Act. When the deposit is made, no notice to the landlord decree-holder is necessary to be given. And, as soon as the amount is deposited, the property is released from attachment, the decree is then treated as satisfied, and the execution proceedings end in an order to that effect. Where, therefore, a purchaser of the holding at a sale in execution of a rent decree obtained by a co-sharer landlord against the registered tenant, (the effect of which is the same as a money decree) deposits the decreetal amount in court for payment to the decree-holder (landlord), alleging that he has acquired a right to the holding by his purchase and that he makes the deposit to protect his right, and reserved his right to realise the amount deposited by him from the former tenant or his heir as the tenant of the holding, and the decree is then treated as satisfied, the attachment is then withdrawn, and the amount deposited is withdrawn by the landlord. *Held*—that the withdrawal of the deposit does not amount a recognition of the purchaser by the landlord. For when the execution is taken out by the landlord under the Code, only the right, title and interest of the tenant in the holding can be sold, not the holding itself. If he has acquired a valid title to the holding that right is not going to be sold in the execution sale, but only the right title and interest of the tenant of the holding which, according to him, are non-existent at that time. Yet he goes out of his way to deposit in court the amount due for rent in the execution proceedings. Under such circumstances the withdrawal of the money by the landlord cannot affect the position or interest of the purchaser.¹

When the transferee has been allowed to deposit the amount of the arrears under S. 170 and 171 B. T. Act and such amount has been withdrawn by the landlord the transferee is entitled to maintain a suit to challenge a decree obtained by the landlord against the recorded tenant enhancing the rent, on the ground that it was collusive.²

¹ *Surendra v. Jugal*—20 C.W.N. 849.

² *Brahmdeo v. Sheo*—2 P.L.J. 561.

XIV. Right to make rent deposit under S. 61, B. T. Act.

Under S. 61
B. T. Act.

The transferee may make a *deposit of rent* under S. 61 B.T. Act. The Act does not make any provision as to how applications other than those in suits are to be made by or on behalf of parties in cases of rent deposit. Neither S. 145 nor S. 188 applies to cases of this description. That being so, the view that an application to deposit the rent need not be presented by the raiyat himself is a correct view of S. 61. A deposit of rent, though not made by a tenant himself but made on his behalf by a transferee of the holding, is a valid deposit¹.

¹ *Behari v. Basarat*—25 Cal. 289.

XV. Right under O. 21 r. 100 C. P. C. '08.

The purchaser of the whole or part of an occupancy Under O. 21 holding not transferable by custom is a representative of ^{r 100 C.P.C.} the judgment-debtor and is entitled, under S. 47 C. P. C., to object to the sale held in execution of a decree for rent obtained by a 16 Anna proprietor¹. It follows that he is not entitled to maintain proceedings under O. 21 r 100 C. P. C. *to be put into possession* of the holding by virtue of his purchase from the recorded tenant (judgment-debtor).²

A purchaser of an occupancy holding at a sale held in execution of a rent decree by a landlord, cannot obtain possession thereof, by *dispossessing a mortgagee* from the tenant who is in possession of the same, *summarily in execution proceedings*, under O. 21 r. 100 C. P. C. Such a person is clearly in possession with a view to the realisation of money advanced to the mortgagor (raiya). From this point of view, his possession may be hostile to the mortgagor, for he is entitled to continue in possession, notwithstanding the wish of the mortgagor to the contrary. It is plain that in a case of this description *the mortgagee is really in possession on his own account and not on account of the judgment-debtor*, within the meaning of O. 21 r. 100 C.P.C. '08, although such possession is derived from the judgment-debtor (mortgagor). The same conclusion is reached if we look at the matter from another point of view. Whether the holding is *transferable* or *non-transferable*, the mortgage creates a valid title in the mortgagee,¹ the possession of the mortgagee is that of an *incumbrancer*, and the purchaser must annul the incumbrance before he can terminate the possession of the mortgagee. From every point of view the purchaser is not entitled to oust the mortgagee summarily in the execution proceeding.³

¹ *Dayamayi's case*—42 Cal. 172 F. B.

² *Panchratan v. Ram*—3 P.L.J. 579.

³ *Kedur v. Saday*—19 C.L.J. 13. The distinction made in this case between the mortgagee of a non-transferable and that of a transferable holding cannot now be maintained in view of the F. B. decision in *Dayamayi's case*.

*XVI. Right to refund of purchase-money under O 21
R 93 C. P. C. '08.*

Right to re-
fund of pur-
chase money.

Right of
suit con-
ferred by
C.P.C. '82.

If so by
New C. P. C.

The question whether the purchaser of a nontransferable occupancy holding in execution of a decree other than a decree for arrears of rent, who is deprived of the property by reason of the fact that the judgment-debtor (raiyat) has no saleable interest therein, or, who is evicted therefrom by the landlord under a paramount title to that of the judgment-debtor, is entitled to bring a *suit to recover his purchase money from the decree-holder*, seems to have given rise to a difference of opinion among the Judges of the High Court. It appears to have been held that the *old C.P.C.*¹ conferred a *statutory right* upon the purchaser which was sufficient to support a suit for the purpose². As pointed out, however, by the Allahabad High Court in a recent case³:—"the corresponding provision in the present Code,⁴ is framed in very different terms. Under that Rule the purchaser's right to refund only arises *when the sale has been set aside* under the preceding Rule 92, and the right conferred is "to an order for repayment of his purchase-money against the person to whom it has been paid"⁵. This implies that the order will be made *as incidental to the proceedings by which the sale is set aside*. The rule previous to that only confers a right to make an *application* to the Court, that is, *to the Court of execution*. The (new) Code confers no right to bring a suit, either directly or constructively. The right to bring a suit, therefore, must depend upon the further question whether the *title to property sold* in execution of a decree is *guaranteed* either by the Court or by the decree-holder. Under what we term the general law, apart from the statute, there is *no warranty of title at a Court sale*.⁶ The Privy Council in the case noted below⁶ points out:—"when property has been so sold under a regular execution, and the purchaser is afterwards evicted under

¹ Act XIV of 1882, S. 315.

² *Munna v. Gajadhar*—5 All. 577: *Puchayappan v. Narayana*—11 Mad. 269: *Gurshidawa v. Gangaya*—22 Bom. 783. *Ram v. Ram*—37 Cal. 67.

³ *Nanu v. Bhagwan*—39 All 114 (118).

⁴ New C. P. C. O 21 r 93.

⁵ *Juranu v. Jathi*—22 O.W.N. 761, dissenting from *Rustomji v. Vinayak*—35 Bom. 29 and relying upon the Allahabad cases noted in 2 above and *Parvathi v. Govindasami*—39 Mad 803 (805).

⁶ *Dorab v. Abdul*—L.R. 5 I.A. 116.

a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor." The position may be seemed up in the words of the learned Judges of the Madras High Court:—"the decision of the Privy Council seems to be an authority for the proposition that the *implied warranty of title* in respect of sale by private contract *cannot be extended to Court sales* except as far as such extension is justified by the processual law in India."¹ If that be the law—apart from any such statutory right as that which might have been conferred by the Code of '82—then such a suit is now incompetent in as much as the present Code, as already stated, is differently expressed and does not support the remedy by suit. This view was very recently expressed by the Calcutta High Court.² A *contrary view* has, however, been taken in another recent case of the Calcutta High Court,³ following a decision of the Bombay High Court⁴ and another of the Allahabad High Court⁵ which are under the new C. P. C. These cases seem to establish that a suit of this nature does lie, and that the purchaser in execution is not limited to making an application under the terms of o.21 r.93 C. P. C. '08.

¹ *Sundara v. Venkatavarada*—17 Mad. 228.

² *Jaranu v. Jathi*—22 C. W. N. 762.

³ Vide 22 C. W. N. 763 footnote.

⁴ *Rustomi v. Vinayak*—35 Bom. 29.

⁵ *Mahammad v. Jai*—36 All. 529.

S. 11. RIGHT OF GIFT.

Right of Gift.

Upon the principle laid down by the recent F.B. decision¹ it appears that the raiyat may make a *valid gift* of a non-transferable occupancy holding. As observed in an English case:—"In order to render a voluntary settlement valid and effectual the settlor must have done everything, which, according to the nature of the property comprised in the settlement, is necessary to be done in order to transfer the property and render the settlement binding on him".² "A man may thus transfer his property without valuable consideration if he does such acts as amount in law to a conveyance or assignment of the property, and thus completely divests himself of the legal ownership which rests in the person who, by those acts, acquires the property."³ To make the above principle applicable to the case of a gift of a non-transferable occupancy holding, it must be established that the nature of the property transferred in this case is such that no valid transfer thereof can be effected till the consent of the landlord is obtained, and the name of the transferee registered in his books.⁴ But the decision of the F. B.¹ shows abundantly that in cases of transfers for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord, and although the validity of the transfer is liable to be questioned by the landlord, who is no party to the transaction—in other words, a transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer.⁴ Further, in the case of a gift, although it may be revoked as a contract may be cancelled, on the ground of fraud, mistake, coercion, undue influence, misrepresentation, or like reason,⁵ it cannot be revoked or rescinded merely on the ground of *want or failure of consideration*. For, although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances.⁴ And, as the F.B. decision shows,¹

¹ *Dayamayi v. Ananda*—42 Cal. 172=18 C. W. N. 971=20. C. L. J. 52 F. B.

² *Milroy v. Lord*—4 DeG. F & J 264. Quoted in 4 below.

³ *Reichards v. Delbridge*—L. R. 18 E. Q. 11. Quoted in 4 below.

⁴ *Beharilal v. Sindhubala*—27 C. L. J. 497=22 C. W. N. 210.

⁵ Transfer of Property Act. IV. of 1882, S. 122, 123, 126.

if a transfer cannot be rescinded if it is for valuable consideration, the inference follows that it cannot be rescinded merely by reason of want or failure of consideration. The donor, therefore, is not competent to revoke the gift after the execution and registration of the document on the ground that the property transferred by way of gift constitutes a non-transferable occupancy holding.¹

Gift can't be rescinded by donor.

So far as his heirs are concerned a gift should be distinguished from a bequest. A bequest is revocable up to the last moment of the life of the testator, and the very moment that the bequest will come into operation, if legal and valid, is the moment when the right of the heir will accrue by operation of law.² The gift is not revocable and is binding as between the donor and the donee. It cannot consequently be maintained that notwithstanding the execution and registration of the deed of gift, the property continues to form part of the estate of the donor. The property ceases to be part of the estate of the donor, and there is thus no escape from the position that the heirs did not succeed to it by right of inheritance. The heirs of the donor, therefore, cannot question the validity of the gift, nor can they revoke it after his death.¹

Heirs of donor bound.

So far as the landlord is concerned, the principle laid down by the F.B. regarding transfer for value apply equally to the case of gifts, and a gift is operative against him in those cases when a transfer for value is operative against him. Thus where the gift is of the entire holding, the landlord is ordinarily entitled to enter on the holding, but where the gift is of a part only of the holding, the landlord is not ordinarily entitled to recover possession of the holding.

Landlord when bound.

¹ *Beharilal v. Sindhubala*—27. C. L. J. 497=22 C. W. N. 210.

² *Amulya v. Tarini*—21. C. L. J. 187=18 C. W. N. 1290=42 Cal. 334

S. 12. RIGHT TO SHARE IN LAND ACQUISITION COMPENSATION.

Share in land
acquisition
compensa-
tion.

An occupancy raiyat is entitled to share in the compensation payable under the law when land comprised in his holding is acquired for public purposes, or by local bodies or companies under the provisions of the Land Acquisition Act. He is a "*person interested*" in the land within the meaning of S. 3 (b) of that Act, inasmuch as he presumably holds at beneficial rates, and can not be ejected by his Zemindar without compensation.¹ Besides, the parties who usually suffer most from lands being taken for Government (and other) purposes are, no doubt, the raiyats with rights of occupancy. The actual occupier is, of course, turned out by the Government, and, if he is a raiyat with a right of occupancy, he loses the benefit of that right, besides being driven possibly to find a holding and a home elsewhere. He would, therefore, generally speaking, be entitled to a larger portion of the compensation.¹ He is usually allowed a portion of the market value (of the land) as compensation without reference to the question whether the occupancy right is *transferable or not*.²

Apportion-
ment thereof.

In *apportioning* the amount of *compensation* money between him and landlord it is said:—"The proper course would be to ascertain, *first*, what was the value of landlord's interest, and, *secondly*, what was the value of tenant's interest, and having found the money value, of these two interests, to apportion and divide accordingly. But, in this country, it is almost impossible to say what is the value of the interest *i.e.*, the precise money value of the lessee's interest on the one hand, and of the landlord's interest on the other. So the Courts have adopted a rough and ready way of settling the matter."³ The Court must ascertain the *amount of rent* payable to the landlord, and *capitalise* that rent at so many years' purchase, the number of years' purchase depending on the particular circumstances of each particular case. The landlord is, at the outset, entitled to that capitalised value.⁴

Landlord
entitled to
(1) capitalis-
ed value of
rent.

¹ *Gadadhar v. Dhunpat*—7 Cal. 585=9 C. L. R., 227. See also *Raja v. Kumari*—3 C. W. N. 202; *Nanda v. Atmarum*—35 Cal. 763.

² *Ambika v. Aditya*—6 C. W. N. 624.

³ *Khetter v. Kumar*—3 C. W. N. 202 (206).

⁴ *Shama v. Brakoda*—28 Cal. 146 (147); *Dinendra v. Tituram*—30 Cal. 801=7 C. W. N. 870=7 C.L.J. 284; *Dunne v. Nobo*—17 Cal. 144.

It is usual to capitalise the value of the rent presently payable by the occupancy raiyat at 20 years' purchase.¹ The landlord is also entitled to the *chance of enhancement* of the then existing rent and to have the value of the chance assessed and a money value put upon it.² *The chance of his rent being enhanced* depends upon the provision of the law that the rent once enhanced cannot be again enhanced within 15 years, and that such enhancement cannot exceed more than 2 annas in the rupee, and in all cases, it must be fair and equitable. But any *possibility* of future enhancement, after the expiry of the period during which the rent cannot be enhanced, or the determination of the lease, cannot be taken into consideration, as it would be very hard to appreciate their money value. The tenant is entitled to the rest of the compensation money. A claim for abatement of rent may be made for land taken by Government for public purpose.⁵

(2) Chance of enhancement of rent.

How calculated.

Raiyats' share.

Abatement of rent.

¹ *Bhupati v. Secretary*—5 C.L.J. 662.

² *Shama v. Brakoda*—28 Cal. 146.

³ *Deendyal v. Thukroo*—6 W. R. (Act X) 24.

S. 13. RIGHT TO REDEEM MORTGAGE.

Right to
redem
mortgage.

Under the Transfer of Property Act "any person owning an interest in or charge upon the property" mortgaged may redeem or institute a suit for redemption of, the mortgaged property.¹ It has been held that a *raiyati* interest is not such an interest. A *raiyat*, therefore, is not entitled to redeem the mortgage of his superior interest, although the *raiyati* lease was created after the date of the mortgage. Consequently, the purchaser of a *raiyati* interest in the mortgaged property is not entitled to redeem it.²

¹ Act IV of 1882, S. 91 (b).

² *Girish v. Juramoni*—5 C.W.N. xxiii.

S. 14. EFFECT OF RAIYAT'S INSOLVENCY.

Ordinarily an occupancy holding, if there is no custom ^{Raiyat's} under which such holdings are saleable without the consent of ^{insolvency.} the landlord, is exempted by the C. P. Code from liability to attachment and sale in execution of what is called a money decree, and it is perfectly open to the raiyat to raise the contention in the course of the execution proceedings, and he is entitled to a decision upon it. When, therefore, an occupancy raiyat is adjudicated insolvent under the provisions of the Provincial Insolvency Act, his occupancy holding cannot vest in the Court or the Receiver under its provisions and become divisible among his creditors.¹ He is, therefore, entitled to raise the objection that the Receiver may not sell it for the purpose of paying up his debts. The District Judge, therefore, cannot direct the sale of the holding at the risk of the purchaser, in such a case without deciding the point.²

¹ Act III of 1907, S. 16.

² *Arman v. Patkhira*—18 C. L. J. 564.

S. 15. DEVOLUTION ON DEATH.

Heritability of right.

The right of occupancy is *heritable* according to the ordinary rules of inheritance to which the raiyat is subject—Hindu or Mahomedan or any other personal law, as the case may be. This is clearly laid down in the Bengal Tenancy Act,¹ which thus removes all doubts regarding the heritability of occupancy holdings, which were expressed by the courts under the old law.² Now an occupancy right is declared to be heritable, whether it is *transferable or not*, "*subject to any custom to the contrary*", the *onus* of proving which must be on the person alleging that it is not heritable.³

Heir can't partially accept or renounce.

There cannot be a *partial acceptance or renunciation of an inheritance*, nor can one of several heirs accept a part only of the inheritance to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of the acceptance of the whole, and carries with it the same liability. If a person accepts the inheritance in whole or in part, he is bound to discharge the liabilities which attach to the late tenant from whom he inherits, unless he can prove that he has since made a formal surrender of the holding to the landlord.⁴ Under the present Act it has been held that, "in as much as the heirs of a raiyat, who may have died intestate, having rights of occupancy, succeed to the holding, and in as much as the raiyat is *bound to pay rent* unless he surrenders in the manner prescribed by S. 86, the heirs are *liable to pay the rent*, whether they hold the land or not. The Zemindar would not be at liberty to occupy the lands of such a tenant, unless he has obtained from the heirs something amounting to actual surrender, and unless he has himself proceeded in the manner prescribed by S. 87, B.T. Act⁵ and is, therefore, only entitled to rent from the heirs until they surrender.

Liability his for rent.

Entitled to hold land.

Default of heir.

When the occupancy raiyat dies without leaving any heir and the crown becomes the *ultimus heres*, his occupancy right becomes extinguished.⁶ Thus, the crown does not

¹ Act VIII of 1885, S. 26.

² *Ananda v. Hari*—27 Cal. 545—4 C.W.N. 608; *Ajudhya v. Imam*—7 W.R. 528; *Jati v. Mangul*—8 W.R. 60.

³ *Finucane & Amir Ali's B.T. Act*, 1st Ed., 151.

⁴ *Mosum v. Bhouldin*—5 C.W.N. 190

⁵ *Peari v. Kumaris*—19 Cal. 790.

⁶ Act VII of 1885, S. 26.

acquire the occupancy right and cannot claim to have possession of the land as the ultimate heir of the deceased holder of the right of occupancy.¹ But, in default of heir, the right is extinguished, and the *holding then reverts to the land-lord*,² who is then entitled to possession and to settle the lands with other raiyats.³

When the immediate landlord, sole or co-sharer, of an occupancy raiyat comes into possession of his holding by succession and "the entire interest of the landlord and the raiyat in the holding becomes united in the same person", the *occupancy right becomes merged* in the superior right of the landlord and is *extinguished*; and, where he is a co-sharer landlord, "he shall have no right to hold the land as a tenant," but shall *hold it as a landlord*, though he shall have to pay to the other co-sharer *rent in proportion* to their shares. "And in either case the acquisition shall not prejudicially affect the rights of any third person."⁴ This will be explained in detail when dealing with the effect of purchase by the landlord and also the extinction of the right by merger.

When the tenant dies without heirs all his interest in the holding also ceases and becomes extinct and with it the security of the mortgage executed by him. The class of cases already referred to where the interests of the landlord and the tenant in the holding become united by succession or other devolution in a representative capacity is wholly distinct from the class of cases where the landlord *re-enters* a vacant holding (*i.e.* on its abandonment by the raiyat) by virtue of his original proprietary right, and not as the representative of the tenant. In such a case, he does not represent the mortgagor tenant in any way and there is no privity of contract between him and the mortgagee.⁵

Therefore heirs of a deceased tenant, dying intestate, having rights of occupancy, are *entitled to hold* on until they have expressly or in a manner from which a surrender may be presumed, as is stated in S. 86, relieved themselves from such liability, and unless they have surrendered or done something from which a surrender in the terms of S. 86 can be presumed, they are liable for rent.⁶ This is at variance with the view taken by the Allahabad High Court, according to which the

¹ Sarada Mitra's *Laud Law of Bengal*, 298-299

² *Muktakesi v Pulin*—8 C.L.J. 324=13 C.W.N. 12

³ *Jateeram v Mangloo*—8 W.R. 60

⁴ Act VII of 1885, S 22

⁵ *Muktakeshi v. Pulin*—8 C.L.J.=324=13 C.W.N. 12.

⁶ *Peari v. Kumari*—19 Cal. 790.

person on whom the right of occupancy devolves, is not bound to accept the tenancy and that it is only an occupancy raiyat in possession who has accepted the occupancy holding that is liable to be sued for arrears of rent which accrued during the lifetime of the person from whom the right of occupancy has devolved upon him.¹

Effect of rent
decree
against some
of heirs.

The heirs of an occupancy raiyat recorded in the landlord's *sherista* are entitled to claim recognition from the landlord, and, if the latter, ignoring them, brings a suit for arrears of rent, and, in execution of a decree obtained thereby, sell the holding, the right of the former is not affected.² They are also entitled in case of the landlord ignoring them to maintain a suit for the purpose.³ When the landlord brings a suit against some of them, the others have to be added as parties.⁴

It often happens that the landlord, being ignorant as to who the heirs of an occupancy raiyat are, brings *suit for recovery of rent against some of several heirs* and the question arises as to whether the decrees obtained in such suits are what are called *rent decrees*. Where the whole body of heirs by their acquiescence allowed one of them to represent all, or when only one got his name registered in the landlord *sherista* and the others did not, a decree obtained by the landlord against one of the several heirs of the occupancy raiyat should be regarded as rent decrees. But where the landlord being aware as to who the heirs are brings a suit against one or some of his several heirs, the decree should be considered as a money decree.⁴

¹ *Lekhraj v. Raj*—14 All. 381.

² *Ananda v. Hari*—27 Cal. 545 = 4 C.W.N. 608.

³ *Baoli v. Hamijuddin*—12 C.L.J. 267.

⁴ *Krishna v. Kali*—22 C. W. N. 289 in which all previous authorities reviewed.

S. 16 DEVISE BY WILL.

The Bengal Tenancy Act does not contain any provision expressly applicable to the subject. From S. 26, which regulates the devolution of occupancy right when a raiyat dies intestate, it cannot be argued that the Legislature has therein, by implication, indicated that a raiyat is competent to make *testamentary disposition* of his occupancy right ; for to do so is to contravene the elementary rule of construction that right cannot be conferred by mere implication from the language used in a statute ; there must be a clear and unequivocal enactment.¹ On the other hand, the provisions made in the Act authorising a tenure-holder and a rayat holding at fixed rates, to dispose of their holdings by will and the absence of a like provision in case of the occupancy raiyat implies a contrary intention. It is, however, stated in the Act that “nothing in any contract between a landlord and tenant after the passing of the Act shall take away the right of a raiyat to *bequeath* his holding, *in accordance with local usage*.”² It is clear from this that the right of an occupancy raiyat to devise his holding by will is intended to be *regulated by local usage*. Thus, ordinarily the right of occupancy is not capable of being bequeathed by will, but local usage may give the raiyat the power to do so. Therefore, except under a local usage, a raiyat is not competent to make a testamentary disposition of a non-transferable occupancy holding.³ What is a *local usage* has already been considered when dealing with the transfer of occupancy right. When there is no such usage but a will is made, the question arises how *far the heirs of the raiyat are bound* by the same, or, in other words, in the case of a testamentary devise is there any *estoppel* as between the testator and the intended legatee or the executor ? As pointed out by Mookerjee J. in a very recent case :—“In the case of a transfer *inter vivos* with or without consideration, there is an estoppel in favour of the transferee as against the transferor and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise * * * It cannot be disputed that it is

Devise by will.

Subject to custom.

¹ *Amulya v. Tarini*—18 C.W.N. 1290=21 C.L.J. 187.

² Act VIII of 1885 S. 178 (3) (d).

³ *Amulya v. Tarini*—18 C.W.N. 1290=21 C.L.J. 187 : *Kunja v. Umesh*—18 C.W.N. 1294.

Devise how
far binding
on heir.
Estoppel
against heir.

open to the testator, up to the very last moment of his life, to change his mind and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator, on the one hand, and the legatee or the executor on the other, there is no room for any possible application of the doctrine of estoppel * * * * Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel it must be an independent estoppel against him, but * * no intelligible principle of justice, equity and good conscience can be suggested upon which any such independent estoppel can be reasonably founded. The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator; at the same moment, precisely, the statutory right of inheritance comes into operation, and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the statute. * * * In the case of a testamentary devise of an *entire* non-transferable occupancy holding the heir-at-law is, therefore, not debarred by the doctrine of estoppel from questioning its validity."¹

Devise of
part.

The F. B. in *Dayamayi's* case did not lay down any principle contrary to what is stated. The validity or against the raiyat of a *transfer* of the whole or a part of an occupancy holding made *voluntarily* depends upon the principle of estoppel, and that of a transfer made *involuntarily* upon the principle of acquiescence and *waiver*. No such principles are applicable to the case of a testamentary disposition. That being so, the grounds upon which a testamentary disposition of an *entire* holding is invalid would apply equally to such a disposition of a *part* of the holding. It is true that the F. B. laid down that in case of a transfer of a *part* of a holding the landlord is not ordinarily entitled to re-enter. But the considerations upon which the right of the landlord as against a *transferee of a part* of a holding have to be determined, have no bearing upon the question.²

¹ *Amulya v. Tarini*—18 C.W.N. 1290=21 C.L.J. 187 dissenting from *Haridas v. Uday*—12 C.W.N. 1086=8 C.L.J. 261.

² *Umesh v. Joy*—22 C. W. N. 474.

S. 17 CONTRACTS OUT OF STATUS.

Such are the rights and privileges which the Legislature has conferred on the raiyat with a right of occupancy. From what has already been stated it is clear that his rights were *originally based on occupation and regulated by custom*. He simply occupies the land, as his forefathers have occupied it before him, subject to the observance of certain conditions, the general character of which is approximately known and understood, though they have never been reduced to a definite written form. There are certain general rights, which all know very well that the raiyat would not give up except under pressure of absolute necessity—rights which are essential to his status. These rights are *not based on contract*, and the whole notion of their being capable of regulation by contract is unfamiliar to him.¹

Rights of raiyat based on custom not contract.

But the Permanent Settlement, which conferred on the zemindars absolute proprietary right in their zemindaries, also *permitted them freely to enter into contracts* with their raiyats on any terms best conducive to their interest. Thus, the Regulations did not restrict in any way the right of contract as between the landlord and the raiyat. As observed by Trevor J. in the *Great Rent Case*:—"the *Khudkasht* raiyats, though they were entitled to *pattas* at the *pargana rates* by the laws of 1793 and following years, and though under S 6 of Regulation IV of 1793 the courts were, in case of disputes, to determine the rate of the *patta* according to those rates, still under the operation of the laws above cited, raiyats might, if they pleased, *bind themselves by specific engagements* irrespective of those rates; and, of course, having done so voluntarily they would be held strictly to the terms of their engagements."² And as pointed out by Campbell J. in the same case:—"if, in a possible case, written contract *inconsistent with the customary rates* and holding under that contract be proved, effect must be given to the contract, except so far as it is varied by the strict interpretation of the provisions of Act X of 1859". And the Rent Acts of 1859 and 1869 provided that a landlord could prevent the acquisition of occupancy right, by the raiyat, when there was express stipulation to this effect in any written contract.³

Freedom of contract allowed by Regulations.

¹ Ilbert, Debate in Council on B. T. Bill.

² B. L. R. Sup. F. B. 202—3 W. R. (Act X) 29.

³ Act X 1859, S. 7—Act VIII of 1869 B. O. S. 7.

In-equality
of position
between
landlord and
raiyat.

But ignorance, poverty, fear of oppression, absence of independent advice are the characteristics of the poor peasantry of Bengal, while "such is the power of the zemindars, so numerous and effective are the means possessed by most of them for inducing the raiyats to accept agreements, which, if history, custom, and experiences be regarded, are wrongful,"¹ that to uphold them would be contrary to good policy. We all know the theory on which the ordinary law of contract is based. It presupposes *equalities between the parties* to the contract, *full knowledge* and *appreciation* by each party *of the nature of the rights* to which he is entitled, and a deliberate *intention on either side to modify* those rights in a particular manner. But, the circumstances which lead up to the execution of a *Kabuliat* by an occupancy raiyat, are of a very different character, and, if we find that he has fixed his signature or mark to a *Kabuliat* purporting to give away rights which are essential to his status, we may feel morally certain that the signature has been obtained under circumstances which are described in the Indian Contract as constituting *undue influence*. In fact, whilst the elements of an ordinary legal contract are offered on the one hand, and accepted on the other, the characteristic elements of the transaction which results in the execution of such *Kabuliats* as these, are pressure on the one side and submission on the other.²

Exercise
of undue
influence by
landlord.

Freedom of
contract
taken away
by B. T. Act.

The Bengal Tenancy Act, therefore, has very wisely *taken away from the raiyat* the so-called *freedom of contract* which he *so long enjoyed* to his detriment, and has *prevented him from contracting himself out of the rights* which are essential to his status. The restrictions to contract are divided into three classes: the *first* referring to all contracts past or future; the *second*, to quite recent contracts; and the *third* to future contracts only. In the *first* class are placed only those contracts which *bar in* perpetuity the accrual of *occupancy rights*, or *destroy* occupancy rights already in existence, or allow ejection without process of law, or prohibit improvements. The *second* class deals with contracts, purporting to bar the accrual of occupancy rights *during a particular tenancy*, and, in this class it was decided not to go beyond the date on which the Rent Commissions Report and Bill were published by Government *i. e.* 15th July, 1880. It may fairly be said that any contracts made subsequent to that date, have been made in order to defeat

Three classes
of contracts
provided for.

¹ Government of India's *Despatch* to Secretary of State.

² Ilbert, Debate in Council on B. T. Bill.

impending legislation, and they should not be given effect to. In the *third* class which only restricts *future* contracts, the general statement has been simply put in the legal form that neither the accrual of the occupancy right nor the enjoyment of the more important incidents attached to that right, shall hereafter be defeated by stipulations in the lease. They relate to right to *use* the land, to *surrender* his holding, to *transfer* or *bequeath* it in recordance with local usage, to *sub-let*, to *reduction of rent*, or *commutation* thereof, or as to *interest* payable on arrears of rent. Such conditions in leases by which the occupancy raiyat is prevented from enjoying these privileges conferred by the Act are declared to be void.¹

Leases relating to *waste* lands are, however, excepted from these restrictions. They are left wholly to contract, except that nothing in the lease shall operate so as to destroy an occupancy right which has grown up during the lease. And, if the waste land has been reclaimed by the landlord himself and then leased out, the raiyat will acquire no occupancy right in it for the first thirty years of such leasing out, if stipulation to that effect is made in contract. These restrictions are meant to encourage reclamation by landlords.¹

Exception in
favour of
waste lands.

¹ Act VIII of 1885, S. 178.

CHAPTER V.

HOW THE RIGHT MAY BE LOST OR EXTINGUISHED.

Extinction of
occupancy
right.

It now remains for us to consider how may the occupancy right be extinguished. Under the Rent Acts of 1859 and 1869 the right of an occupancy raiyat could be determined for *non-payment of rent*, for *breach of any condition* in the contract of lease, express or implied—sometimes by the *denial of landlord's title*, by *surrender*, *abandonment*, *transfer*, *escheat*, by *compulsory acquisition* for public purposes, by *merger*, and by submersion of the holding. This is also the case under the present law. I have already dwelt upon these in other places. It remains for me to consider the case of extinction of occupancy right by *merger*.

Doctrine of Merger.

Doctrine of
merger.

The doctrine of *merger* is based on the maxim of law :—*'Nemo potest esse teneus et dominus'*—a person cannot be, at the same time, both landlord and tenant of the same premises. "It may be laid down as a general rule that, whenever the *particular estate* and that immediately in *reversion* become, by some act or event, subsequent to the creation of the particular estate, for the first time, *vested in one person in the same right*, their separate existence will cease, and a *merger* will take place." Thus, when a person holds a term of years, the union of the term with the immediate reversion, both being vested, *at the same time, in one person, in the same right*, determines the lease by *merger*. In such a case, the reversion *merges* or *drowns* the term.¹

Its applica-
tion to muf-
assil.

Whether the doctrine of merger applies to lands in the *muffasil* in this country is a matter of doubt.² But the analogous doctrine has been enacted in the Transfer of Property Act, which applies to *non-agricultural* tenancies, by which a lease of immovable property determines in case the interests of the lessor and the lessee in the whole

Under T. P.
Act.

¹ Wood-falls' *Landlord and Tenant*, 326 ; quoted in Finucane and Amir Ali's B.T. Act, 1st Ed., 129.

² See *Womesh v. Rajnarain*—10 W. R. 15 ; *Ruston v. Atkinson*—11 W. R. 485. *Thomas v. Panchanan*—25 W. R. 503 ; *Jibanti v. Gokool*—19 Cal. 790 ; But See *Prasanna v. Jagat*—30 L.R. 159.

of the property become vested at the same time in one person in the same right.¹

As regards *agricultural* tenancies, the principle that when the interests of the lessor and lessee of immovable property vest in one and the same person by operation of law or by voluntary transfer, the subordinate right becomes merged in the superior right, was enunciated in a number of rulings previous to the passing of the Bengal Tenancy Act,² though the contrary was also laid down some other cases.³

The B.T. Act of 1885 laid down the same principle in the following words :—“ When the immediate landlord of an occupancy holding is a proprietor or a permanent tenure-holder, and the *entire interests of the landlord and the raiyat in the holding become united in the same person* by transfer, succession or otherwise”⁴ [which means ways other than transfer, or succession but *similar* to them,⁵ and does not include *surrender*⁶ nor *reversion* to or vesting of the interest in the landlord on the death of the occupancy raiyat without heirs]⁵ or “if the occupancy right in land is transferred⁷ to a person jointly interested in the land as proprietor or permanent tenure-holder”⁸—then, in either of these cases—“the occupancy right shall cease to exist.”⁹

Effect of acquisition of occupancy right by landlord.

Thus when a sole or ‘*sixteen annas*’ landlord acquires a right of occupancy in the ways stated above, he ceases to have the occupancy right altogether. Even a *Benami* purchase by the proprietor, in the name of a third person, of an occupancy raiyat’s land, determines the raiyat’s interest,¹⁰

¹ Act IV of 1882, 111 (d), See also *Promotha v. Kali*—28 Cal. 744. *Singa v. Nanda*—32 Cal. 312.

² *Mitrajit v. Fair-patrick*—11 W. R. 206 : *Reed v. Sreekissen*—15 W. R. 430 : *Balchand v. Lathu*—23 W. R. 387 : *Lal v. Solano*—10 Cal. 45 = 12 C. L. R. 559. *Radha v. Rakhal*—12 Cal 82.

³ *Umesh v. Raj*—10 W. R. 15 : *Ruston v. Atkinson*—11 W. R. 485 : *Savi v. Panchanan*—25 W. R. 503.

⁴ Act VIII of 1885, S. 22(1)

⁵ *Mukta v. Pulin*—13 C. W.N. 12 = 8 C. L. J. 324.

⁶ *Badan v. Rajeswari*—2 C. L. J. 570. *Nil v. Ghatu*—4 C. W. N. 687.

⁷ S. 22 (2) speaks of transfer but not of “*succession or otherwise*” as Ol. (1). But this may be due to inadvertence or hurried drafting”—*Amir Ali & Finucane’s B. T. Act*, 2nd Ed., 146 Fn. 2. But unfortunately when the Act was amended this is not corrected probably owing to over-sight.

⁸ Act VIII of 1885, S. 22 (2).

⁹ *Ibid* both (1) and (2).

¹⁰ *Radha v. Rakhal*.—12 Cal 82.

and with it the right of occupancy. Similarly, if the owner of a *fractional* share of an entire estate acquires an occupancy holding, then, so far as he is concerned, the *right of occupancy shall cease to exist*.¹ In other words, in such cases the right of occupancy becomes merged in the superior right of the landlord and *ipso facto* extinguished and disappears altogether. And where certain co-sharer zemindars, who were in *separate possession of the separate portions of lands* comprised in the zemindary, purchased *raiya*ti holdings and were in separate possession of them, *held* that there was no relationship of landlord and tenant.²

Union of
entire
interest
necessary.

There must be the union of "*the entire interests of the landlord and the raiyat*" in one and the same person.³ This will be the result whether the *landlord acquires the raiyat's interest or the raiyat the landlord's*. Thus, if the raiyat acquires only a *fractional share* of the landlord's or the intermediate tenure-holder's interest, he would not lose his right of occupancy.⁴ If, however, he acquires the '*16 annas*' interests of his landlord his occupancy right ceases to exist.⁵ A distinction is thus made between the case of a co-sharer landlord acquiring the raiyat's interest and a raiyat acquiring a fractional share of the landlord's or intermediate holder's interest. If the owner of only a fractional share of an estate acquires an occupancy holding then so far as he is concerned, the occupancy right "*ceases to exist*."⁶

Continuance
of holding
divested of
occupancy
right, where
he is co-sharer
landlord.

In construing S.22 (2), which deals with the acquisition of occupancy right by a co-sharer landlord, a Full Bench of the High Court pointed out :—"It is not said, and the sub-section cannot be understood to mean, that the holding shall cease to exist, but that the occupancy right shall cease to exist, and there is nothing in the sub-section inconsistent with the *continuance of the holding divested of the right of occupancy* which attached to it."^a "The effect of the purchase of an entire occupancy holding by the landlords is not necessarily to put an end to the holding, but to divest it in their hands of the right of occupancy,

¹ Finucane and Amir Ali's B. T. Act, 1, Ed., 131.

² Gobinda v. Sreenath—3 C. L. J. 141.

³ Act VIII of 1885, S 22 (1).

⁴ *Ibid*, Explanation, see also Goor v. Joo.—16 Cal 127 ;

Jardine v. Sarat—L. R. 5 I. A. 164=3 C.L.R. 10.

⁵ Finucane and Amir Ali's B.T. Act, 2nd Ed., 145—156.

⁶ Jawadul v. Ram—24 Cal. 143 F.B.=1 C. W. N. 106, followed in *Miajan v. Minnat*—24 Cal 521 affirmed by Full Bench in *Ram v. Kachu*—1 C.L.J. F.B.=9 C. W. N. 249=32 Cal. 386; *Lal v. Jagir*=13 C.W.N. 913.

if any, which attached to it,"¹ The effect of this decision was that if a (co-sharer) landlord acquired a holding to which a right of occupancy was attached, the *right ceased to exist but not the holding*; in other words, the *holding continued in existence divested of the occupancy right*. Thus, in respect of the purchase of an occupancy holding by a co-sharer landlord, it was settled law under the old B. T. Act that *non-occupancy right would be kept alive* by the co-sharer landlord purchaser². It would seem, therefore that if he were to transfer it to somebody else he would have a valid title there-in, and might acquire a right of occupancy in the land under the provisions of the law.

But if the purchase was made *on behalf of all* the landlords, the whole tenancy was merged (under the old section as it stood before the amendment in 1908). And even where they subsequently gave a sublease in respect of the holding to another tenant, the whole tenancy being already brought to a termination, they could not be heard to say that the non-occupancy right still subsisted.³

Thus, although by the operation of the section the occupancy right ceased to exist, there might be a *good transfer of the holding*.

But, as explained in a subsequent case:—"S.22 read in connection with the other sections of the Act, must be taken to refer to occupancy holdings, which are of a *transferable* character. And although under its provisions an occupancy right may be severable, it is *severable only in the cases to which it applies* and cannot be made severable in all cases. Apart from any special provision of law such as is contained in it and is applicable only to the cases referred to in it, it does not seem possible on any principle to hold that in the case of a *non-transferable* occupancy holding, the holding can be sold without the right of occupancy so as to give the transferee a right to *retain possession of it* (as against his other co-sharers). S22 does not make a non-transferable occupancy holding transferable when the purchaser happens to be one of the proprietors³, that is to

Distinction between transferable and non-transferable holding.

Merger when holding transferable.

¹ *Miajan v Minnat*—24 Cal 521; see also *Sitanath v Pelaram*—21 C.L.J. 869.

² *Rajaram v Jhanti*—34 Ind Cas. 75 (Pat) distinguishing *Miajan v Minnat*—24 Cal 521, following *Ram v Mahmed*—3 C. W. N. 62.

³ *Girish v Kedar*—27 Cal 473=4 C. W. N. 569; *Dilbar v Hossein*—26 Cal 583; *Ramrup v Manners*—4 C. L. J. 209, doubted in *Udoy v Hari*—13 C. W. N. 937, but affirmed by F. B. in *Ram Kachhu*—32 Cal 386=1 C. L. J. 1=9 C. W. N. 249, also another F. B. in *Lakhan v Joinath*—34 Cal 576=5 C. L. J. 457, and also recently by another F. B. in *Dayamoyi v Ananda*—18 C. W. N. 971=20 C. L. J. 52=42 Cal 172

say, a co-sharer landlord. A co-sharer landlord who purchases a non-transferable occupancy holding, "is a purchaser without the landlord's consent, using the term landlord in its proper signification of the *whole body* of landlords"¹. He is, therefore, in no better position than a third party purchasing such a holding.

Where he is
sole landlord.

But, in a case where the purchaser is a 16-annas landlord, there appears to be no reason for distinguishing between a transferable and a non-transferable occupancy holding², for he himself being the purchaser he is presumed to have given his own consent to the transfer in his favour.

There can be little doubt that when a co-sharer landlord acquires a *non-transferable* occupancy holding there is still extinction by *merger* of the right of occupancy which attached to it. For, being himself a landlord, he cannot have the right of occupancy in the holding purchased by him.

Position of
co-sharer
landlord in
case of mer-
ger.

When a co-sharer landlord purchases the interest of an occupancy raiyat, the question arises whether he is entitled to retain *exclusive khas possession* of the land or bound to deliver *joint possession* of it to his other co-sharers. We have already seen that apart from S. 22(2) of the B.T. Act, it does not seem possible on any principle to hold that in the case of a non-transferable occupancy holding, the holding, can be transferred without the occupancy right, so as to give the transferee a right to retain possession of it; and the original S. 22 did not make a non-transferable holding transferable when the purchaser happens to be one of the proprietors³. On the principle stated above, which has not been overruled by any decision of a Full Bench⁴, where such a holding is transferred to one of the co-proprietors, the transferee co-proprietor must be treated as a purchaser *without the landlord's consent*, using the term landlord in its proper signification of the *whole body of landlords*, and is in no better position than a third party, and the holding, on its transfer, must be treated as having been abandoned by the raiyat. When, therefore, the transferee co-proprietor comes into occupation of it after the transfer, he is *in occupation of it without any title*. The other co-proprietors are, therefore, entitled to recover *khas possession* of the holding *jointly* with him, to the extent of their shares⁴. Thus, a

Bound to give
up joint pos-
session to his
other co-
sharers
when hold-
ing non-
transferable.

¹ *Hara v Umesh*—11 O. L. J. 20.

² *Ram v Kachu*—32 Cal 386 F. B.=1 C. L. J. 1=9 C. W. N. 249
Judgment of referring judges: *Lal v Mahomed*—13 C. W. N. 913 *Per*
Jenkins C.J. and *Mookherji J.*

³ *Girish v Kedar*—27 Cal 473.

⁴ *Salima v Enatulla*—15 Ind Cas 524.

non-transferable occupancy holding cannot be sold to a co-sharer landlord so as to give the transferee a right to retain (exclusive) possession of it¹. In the case of a transferable holding however (to which alone S 22 B.T. Act applies) a Full Bench of the High Court, after a consideration of all the cases on the subject, has laid down that the result of the purchase by a co-sharer landlord of the occupancy holding of a tenant is *not the extinction of the tenancy right altogether but of his occupancy right in the holding*. He is, therefore, entitled to hold the land and to retain exclusive khas possession of it, in opposition to his other co-sharers, and they are not entitled to joint possession with him².

Entitled to exclusive possession when transferable.

The acquisition of an occupancy right by a proprietor did not, however, affect the *right of his other co-sharers to receive their shares of rent of the tenancy*³, as there was no law in this country to prevent one of several co-proprietors holding the status of a tenant under the other co-proprietors of land which appertained to their common estate⁴. A co-sharer landlord, therefore, acquiring the right of a raiyat, could hold the land as a raiyat if not to himself, certainly to the other co-sharers, and his other co-sharers were not entitled to joint khas possession with him.⁴ Thus, in respect of the purchase of an occupancy holding by a co-sharer landlord, it was settled law that under the old Tenancy Act the non-occupancy right would be kept alive by the co-sharer landlord purchaser⁵.

As raiyat under other co-proprietors.

The effect of the decisions just discussed was to lay down "a rule of law which was opposed to the policy of the authors of the Bengal Tenancy Act viz. to discourage the acquisition of occupancy holdings by the landlords"⁶. As pointed out by Rampini and Mitra JJ :—"** according to the terms of S 22 (2) and the intention of the Legislature which framed the B. T. Act, an occupancy right purchased by a

View opposed to policy of B. T. Act.

¹ *Lakhi v Balabhadra*—19 C. L. J. 400 : *Bijoy v Shosimukhi*—12 Ind Cas 67 : *Salima v Enatulla*—15 Ind Cas 524 : *Kanchan v Kamala*—21 C. L. J. 441.

² *Ram v Kachu*—32 Cal 389 F. B.=1 C. L. J. 11=9 C. W. N. 247 ; see *Bijoy v Shosimukhi*—12 Ind Cas 67.

³ *Sitanath v. Palaram*—21 Cal. 869.

⁴ *Jawadal Hug's case*—24 Cal. 143 F. B.=1 C. W. N. 106 & F. B. ruling in *Ram v. Kachu*—I. C. L. J. 1. F. B.=9 C. W. N. 249=32 Cal. 386.

⁵ *Raja v Jhanti*—34 Ind cas 75 (Pat) distinguishing *Miajan v. Mnnat*—24 Cal. 521 following *Ram v. Mahamad*.—3 C. W. N. 62.

⁶ Notes on the Clauses of B. T. (Amendment) Bill 1906.

co-sharer landlord, who was joint proprietor or a joint permanent tenure-holder, *ceased to exist*, and no tenancy or any other right remained by virtue of which the *purchaser could obtain khas possession of the land as a tenant*. The reasons for this conclusion are :—(i) that to hold otherwise is to introduce a *new class of tenants* not contemplated by the Act (see S 4) ; (ii) that to lay down the contrary is to frustrate the object of the introduction into the Act of S 22, which was to discourage the purchase by the landlords of their tenants' rights or to prevent them from *encroaching upon the raiyati land of the province and converting it into nij jote land* ; (iii) that the words in S 22(2) "*shall cease to exist*" occur also in S 22 (1) and so, if, in the circumstances referred to, the tenancy is not to cease to exist, but to continue divested only of the occupancy right, then under S 22 (1) a (sole) landlord may purchase an occupancy holding, and *become his own tenant*, which would seem to be opposed to the fundamental principles which underlie the law of landlord and tenant in all countries ; and (iv) that if the Legislature had intended to lay down any such rule as has been laid down in the above cited rulings, it would surely have conveyed its meaning not by implication but by means of clear and unambiguous language", and they referred the following question to a Full Bench :—"Were the cases, (already cited) so far as they lay down that when occupancy right is purchased by a sole or joint proprietor or permanent tenure-holder *only the occupancy right ceases to exist* but the *tenancy remains divested of the occupancy right*, correctly decided, or in such a case, do the *occupancy right and the tenancy right cease to exist*, so that the sole or joint proprietor or permanent tenure-holder who purchases, *acquires no right as a tenant at all* ?" But the Full Bench refused to reconsider the question and upheld the former decisions.¹

Amendment
by Act I of
1907 B.C.

To counteract their effects, the Legislature at last thought fit to intervene, and the Select Committee to consider the Bill for the Amendment of the B.T. Act, which was passed into Act I of 1907 B.C., greatly modified the provisions of sub-section (2). "The amendments made by them will"—as they stated in their report,—"*give effect to the intention of the framers of the Act by providing that where one of several co-sharer landlords or joint tenure-holders acquires an occupancy right of a tenant of all the co-sharers*

¹ *Ram v. Kachu*—referring judgment in 1 C.L.J. 1 FB=9 C. W. N. 249=35 Cal. 386.

or joint tenure-holders, such *land-lord cannot thereby acquire an occupancy right.*" The actual Section that has been passed into law has been thus worded:—"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to *hold the land subject the payment* to his co-proprietors or joint permanent tenure-holders of the *shares of the rent* which may be from time to time payable to them." And "to make the meaning of the section quite clear" the following illustration has been inserted:—"A, a co-sharer landlord, purchases the occupancy holding of a raiyat X. A is entitled himself to *hold the land on payment to his co-sharers of the shares of the rent* payable to them in respect of the holding"¹.

But the sub-section, as it even now stands after the amendment, while it *does not clearly extinguish the tenancy* or the holding, leaves the status and position of a co-sharer landlord purchasing an occupancy holding, with reference to his other co-shares, as *anomalous* and uncertain as they were before. Thus the Amendment, while providing that (in respect of his *possession*) the purchasing land-lord shall pay to his co-sharers the sum which would have been payable, from time to time, as rent by the occupancy raiyat, does not, (though intended to) make it clear whether his possession is *exclusive or joint possession of a co-sharer proprietor or tenant* (i.e., a tenure-holder, or raiyat, as the case may be). That the status of a person who is "entitled to hold the land" under another subject to the payment of "*rent*" (be it a *share*) is that of a *tenant* admits of no question,² and this fact, together with the use of the word "*rent*" for the sum payable by the purchasing co-sharer (proprietor or tenure-holder) to his other co-sharers, lends countenance to the view that he will *hold the land exclusively as a tenant paying rent to his other co-sharers in proportion to their shares.* The position is, no doubt, inconsistent, although the right of the co-sharer landlords to receive their shares of the rent of a holding in possession of the other co-sharers has been long recognised. But, where the purchasing landlord is a *tenure-holder*, it is obvious that he can be a '*tenant*'³ and though a '*tenant*,' includes a '*raiyat*' he *cannot be a raiyat*

His position on amendment.

Is he tenant?

Can't be raiyat.

¹ Illustration added to * 22 of Act VIII of 1885 by Act I of 1907 B. C.

² This conclusion is further supported by the definition of "*Tenant*" as given the Act. See Act VIII. of 1885, S 3 (3).

³ *Ibid*, S 4.

Remains co-sharer proprietor or tenure-holder.

Amendment in E. B. & A. Act.

himself in respect of the holding, in as much as he is a "*tenure-holder*," and also because, as stated in the *illustration* whether he is a proprietor or a tenure-holder, his lessee cannot be a tenure-holder or a raiyat in that case; and if he is regarded as a tenure-holder under his co-sharer that would be an anomaly, for the latter let it out to his predecessor as a *raiya* holding. Further, the fact that a sub-lessee from him (on his acquiring the holding) holds the land as a tenure-holder or a raiyat, as the case may be, as stated in the newly added *illustration*, leads us to the conclusion that he himself holds the land as a *co-sharer proprietor* or *tenure-holder* and, as such, loses the occupancy right that attached to the holding before his acquisition. The occupancy right, therefore, in this case also *merges* in the superior right of the landlord and ceases to exist.

To obviate these difficulties, the late East Bengal and Assam Legislative Council changed the words of the subsection, as it stood after the amendment made by the Bengal Council, in the following way:—"such person shall have no right to hold the land as a *raiya*, but shall hold it as a *proprietor* or *permanent tenure-holder*, as the case may be, and shall pay to his co-sharers a fair and equitable sum for the use and occupation of the same," That is to say, his possession of the holding is the possession of a *proprietor* or *tenure-holder* and not a *raiya*. But even this does not render the position and status of a co-sharer landlord purchaser clear and certain, but leaves it still more anomalous. For though to avoid confusion the word "*rent*" has not been used, a sum payable for "*the use and occupation*" of land is but another name for "*rent*," and a person who pays such a sum to another for "*the use and occupation*" of his land is, in the eye of the law a "*tenant*." And the position of a person who holds land in the double capacity of a '*proprietor*' and a '*tenant*' is quite inconceivable. But there can be no doubt that he cannot retain the occupancy right when he acquires the holding.

Has exclusive possession not as tenant but as proprietor.

The effect of the law, as it now stands, seems to be that it prevents one of several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to their common estate. It thus nullifies the contrary dictum laid down in a well-known case, though it confirms the view of the old law that a co-sharer landlord has the right to receive his share of rent of the tenancy

¹ *Jawadul Haq v. Ram*—24 Cal. 142=1 C. W. N. 116 and others already cited several times.^{son.}

from the co-proprietor who acquires the right of occupancy.¹ We have already seen that S. 22 (2) of the B. T. Act before its amendment applied only to a case in which a transferable occupancy holding is the subject-matter of the purchase. And in so far as the question whether it applied only the transferable or both to transferable and non-transferable holdings its language has not been altered by the amendment made.²

Even where an occupancy holding is transferred to a co-sharer landlord and such transfer is recognised by the other landlords and rent received by them in respect of it, such recognition will amount to evidence either of the holding being a transferable one or of the fact that, though (non-transferable and so its transfer is) voidable at their instance, it has been validated by their recognition. In either view S22 applies to such a case. And he is entitled to hold the land so purchased on payment to his other co-sharers of a fair and equitable sum for the use and occupation of the same³.

Yet liable to pay share of rent.

When owing to merger, as explained above, the occupancy right becomes *ipso facto* extinguished, the land does not become the private land of the proprietor but continues to form part of the raiyat stock of the country; so that if it is settled with another raiyat, the right will accrue in his favour [*immediately*, if he is a settled raiyat of the village, or if not] on the completion of the statutory period; and if there are under-raiyats already in occupation they may take the place of the raiyat whose occupancy right has been acquired by the proprietor⁴. But a new occupancy right

Land does not become raiyat but remains raiyat.

cannot be acquired in the same tenancy by a co-sharer proprietor by whose action the occupancy right has ceased to exist. It may be contended that under S22 B.T. Act the occupancy right, which is extinguished by the transfer of it to the co-sharer landlord, is only the right which is existing at the date of the transfer, and there is nothing to prevent the acquisition of a new occupancy right (by reason of their continuously holding the land as a raiyat for a period of twelve years and more from) the date of their purchase. But to hold this will defeat the policy of the section. And further, the owner of the holding cannot acquire a right adversely to himself in his other character as coproprietor⁵.

Landlord can't acquire new occupancy right.

¹ *Sitanath v. Pelaram*—21 Cal. 869.

² *Bipradas v. Surendra*—22 C. W. N. xxiv.

³ *Enatullah v. Mosen*—25 Ind. Cas. 414.

⁴ *Amir Ali and Finucne's B. T. Act*, 2nd Ed. 145.

⁵ *Ram v. Bhela*—14 C. W. N. 194=36 Cal. 709=7 C. L. J. 709,

Effect of such acquisition on rights of third parties.

Reservation
of rights of
third per-
sons.

The B. T. Act, 1885 made special reservation regarding the rights of *third persons*, and laid down that though, on the acquisition of the occupancy right by the sole or a co-sharer landlord, as between the transferor and the transferee, the occupancy right ceases to exist, the result *shall not "prejudicially affect the rights of any third person"*¹. "*Third person*" here means every person interested *other than* the transferor and the transferee², and includes an *under-raiyat*³. The rights of third persons must be *valid rights*⁴. Thus, when an occupancy right has been *sub-let* or subjected to a *mortgage*, then its purchase by a sole or co-sharer landlord should not be regarded as destroying or injuring the rights of the under-raiyat or mortgagee⁵ in all cases.

Position of
under-raiyat
already on
land.

The question arises whether a *sole landlord acquiring* the occupancy right is entitled to *eject an under-raiyat*, who holds the land under the raiyat whose occupancy holding he has purchased. It is not difficult to answer the question when a landlord *purchases an occupancy right in execution of a decree for rent* under the provisions of the B. T. Act. In such a case he acquires the right to avoid what are called the "*incumbrances*" on the holding, and an under-raiyati lease being regarded as an *incumbrance*, he can do away with the *under-raiyati lease*⁶, *if it is not protected* under S. 85 of the Act. Where, however, the *under-raiyati lease is protected under S. 85* of the Act, different considerations arise. The effect of the purchase, being, as we have already stated, to keep alive the occupancy holding, though merging the occupancy right, the right of the person already on the land as an under-raiyat does not cease. If he does not acquire the status of a raiyat, his status continues to be what it was *viz.*, that of an under-raiyat, and he is thus protected both under S 22(2) and S 49 B. T. Act. The purchasing landlord can; therefore, eject the under-raiyat after having served him with a *notice to quit* under S 49 (2), or re-enter the holding after the expiry of the lease, when it is so protected. Thus a landlord so purchasing the holding of a raiyat in execution of

When '16 As'
Landlord pur-
chases at
rent exe-
cution sale.

¹ Act VIII of 1885, S 22 (1)—(2).

² *Sitanath v. Pelaram*—21 Cal. 869.

³ *Amirulla v. Nazar*—31 Cal. 952.

⁴ *Peari v. Badal*—28 Cal. 205=3 C. W. N. 312; *Ram v. Bhela*—37 Cal. 709.

⁵ *Ram v. Kachu*—1 C. L. J. 1=9 C. W. N. 249=32 Cal. 386 F B.

⁶ *Ram v. Bhela*—14 C. W. N. 814.

a decree for arrears of rent, is entitled to take *khas possession* by ejecting the under-raiyat whose lease was created without the land-lord's consent and not registered; such a right not being protected by S 22(1) of the B. T. Act,¹ nor by S161(c) as an incumbrance². And in this respect there is no distinction between a transferable and a non-transferable occupancy holding.

But difficulties and complications crop up in cases of *voluntary transfers* in favour of the landlord and purchases made by him at sales in execution of *money decrees*. Under such circumstances, also, it was contended in some cases that the landlord was entitled to eject the under-raiyat under S 85(1) of the B. T. Act. But, as pointed out by Jenkins C. J. in the case noted below:—"The right of the landlord under S 85(1) is a right vested in him by virtue of his landlord's interests and not by virtue of any other interest he might acquire; and to entitle the landlord to act by virtue of that interest there must be no obstacle in the shape of an *intervening interest*." But it was contended in that case on behalf of the landlords that "the raiyat's transferred interest has been extinguished, and, in this view, reliance was placed on the doctrine of merger and the terms of S 22(1) B. T. Act", so that there was no such *intervening interest* to debar the landlord from ejecting the under-raiyat under S 85(1) B. T. Act. "But"—as the learned Chief Justice again points out—"it is at least doubtful whether the doctrine of merger applies to lands in the mufassil. And if it be assumed that it does, it cannot be that it should be more oppressive in its operation on the under-raiyat than the English common law doctrine * * * So clearly the doctrine of merger does not help the landlords. Then is there anything in the Act which assists them? Our attention has been drawn to S 22(1), and there no doubt it is provided that 'when the *entire* interest of the landlord and raiyat in the holding becomes united in the same person by transfer * * the occupancy right shall cease to exist.' It may be a question whether it can be said on the facts of this case that the *entire* interest of the raiyat has united with that of the landlord. But be that as it may, what is it that has ceased to exist?—the occupancy right and not the entire

When he does so at private or other execution sale.

¹ *Peary v. Badal*—28 Cal. 205=8 C.W.N. 310 see also *Pran v. Mukta*—18. C. L. J. 193: *Fakir v. Banamali*—18 C.L.J. 252: *Gangadhar v. Rajendra*—17 C. W. N. 860.

² *Anant v. Manners*—29 Ind Cas 459: *Yakub v. Meajan*—43 Cal. 164=29 Ind Cas 686.

Lal v. Agir—13 C. W. N. 913.

interest of the raiyat—So that on the words of the section, there would be no extinguishment of the holding, and I see no reason for adopting a construction beyond what the language imports.¹ And if, as I have shown, the holding continues in favour of the under-tenant, then there is a *continuing intermediate interest* between that of the landlord and the under-tenant which furnishes an answer to any claim under S 85(1). To hold otherwise would involve the view that if the position were reversed and the raiyat acquired the holding of his landlord he could call S 85(1) in aid against his own tenant; for this he could not contend. The conclusion at which I have arrived is in substantial accord with the decisions (in the cases noted below which are leading cases on the point)."² It may further be pointed out, as observed in one of the cases just referred to¹, that in the cases of a *transferable* occupancy holding, although by reason of such purchase the occupancy holding might merge in the landlord's interest under S 22 of the B. T. Act, and although under S 85(1) of the Act the sub-lessee might not, by reason of the sub-lease, acquire any right as such against the landlord, the landlord, having acquired the occupancy holding at a private sale from the raiyat, purchased only his right, title and interest in the holding, and could not claim any higher right than that of the occupancy holder himself, and was not entitled to eject the sub-lessee without serving upon him a notice to quit under S 49 of the Act.³ The same principle applies to the case of a mortgage of a holding (whether transferable or non-transferable) the mortgage being in that case binding on the landlord.

Surrender
by raiyat.

But no notice to quit is necessary where a raiyat *surrenders* his holding and a landlord, who was a *jotedar* under government, wanted to eject the under-raiyat set up on the land by the raiyat without the landlord's consent.⁴

Death of
raiya.

Where the occupancy raiyat *dies without heirs* the landlord gets the holding free from all incumbrances created on it by the raiyat in favour of a third person,⁵ whether by way of a mortgage or a sublease.

¹ *Jawadul v. Ram*—1 O. W. N. 186=24 Cal. 145=3 C. L. J. 145.

² *Amirulla v. Nazir*—31 Cal. 932; 34 Cal. 104; 3 C. L. J. 155
Peary v. Badal—5 C. W. N. 310=23 Cal. 205 distinguished in that the tenant's interest did not pass to the landlord by voluntary act of the tenant.

³ See ¹ above and *Lal v. Jagir*—13 C. W. N. 913; *Pran v. Mukta*—18 C. L. J. 193.

⁴ *Badan v. Rajeswari*—2 C. L. J., 570.

⁵ *Mukta v. Pulin*—8 C. L. J., 324=13 C. W. N., 12.

The effect of purchase by a proprietor, or a permanent Under-raiyat does not become raiyat.
tenure-holder of an occupancy holding is to vest the holding in the purchaser, subject to the limitation that the occupancy right ceases to exist. *The holding does not cease to exist, but merely the occupancy right, which is one of the incidents of the holding, disappears.* The holding does not vanish but is kept in *suspense*.¹ An *under-raiyat* on the holding, therefore, does not get a lift, and is *not raised to the status of a raiyat* but continues to be an *under-raiyat*.² The same is the case where the cosharer landlord acquires the occupancy right.

To avoid these confusions the law was greatly modified by Act I of 1907 B. C. And the law, as it now stands, although it does not state definitely, and in fact omits the provision in the original Act regarding the *extinction by merger* of the occupancy right under the circumstances aforesaid, makes the position of the *under-raiyat* more secure. For under the present law a sole or "*sixteen annas*" landlord acquiring an occupancy holding "*shall have no right to hold the land as a tenant, but shall hold it as a proprietor or permanent tenure-holder (as the case may be).*"³ Thus, when the sole landlord acquires an occupancy holding of his raiyat, as he cannot, on such acquisition, "*hold the land as a tenant*" (or a raiyat), but shall do so as a "*proprietor*" or a permanent "*tenure holder,*"³ *the raiyati tenancy itself "ceases to exist" and with it the right of occupancy, which is an incident of the holding, merges in his superior right as landlord and becomes ipso facto extinguished.* The holding does not exist divested of the occupancy right, as was held in the F. B. decisions already discussed. That by being the case, the *under-raiyat* already existing on the land and in occupation thereof by virtue of a lease from the raiyat, is *brought into direct relationship with the landlord and takes the place of the raiyat* whose occupancy holding is acquired. He will no longer remain an *under-raiyat*, but gain in status and become a *non-occupancy raiyat*, liable to be ejected only on the grounds set forth in S44 B. T. Act. And this is the case whether the occupancy right is

Amendment by Act I of 1907 B.C.

Acquisition by "16-Ans." landlord.

Holding ceases to exist.

Under-raiyat becomes non occupancy raiyat.

¹ See *Akhil v. Hussain*—18 C.L.J., 262=10 C.W.N., 246;

² *Ram v. Kachu*—I.O.L.J.=9 C.W.N., 249=32 Cal. 386 F. B. (Referring Judgment, *Pran v. Mukta*—Ibid 193. The contrary opinion expressed by Amir Ali and Finucane on a construction of the old section is wrong. —See their B. T. Act 1st 2nd, 130.

³ S 22 B.T. Act as amended by Act I. of 1907 B.C.

transferable or not, the 16-annas, landlord being himself the purchaser.¹

Acquisition
by co-sharer
landlord.

Holding
ceases to
exist.

Under-
raiyats
becomes non-
occupancy
raiyat.

When holding
transferable.

When it is
not so.

And, whatever might be the position of a *co-sharer landlord* with respect to the occupancy holding purchased by him in relation to the other co-sharers under the amended section, he will not be prevented from cultivating the land himself, though the holding will not become the *proprietor's private land* but will form *part of the raiyati stock* of the country,² and if he sublets the land to a third person the latter shall be deemed to be a *tenure-holder or a raiyat*, as the case may be, in respect thereof³, and if the land is settled with another *raiyat*, the right of occupancy will accrue in his favour *immediately*, if he is a settled raiyat of the village, or, if not, on the completion of the statutory period.⁴ As he "is entitled to hold the land" himself, not as a raiyat but as a proprietor, the holding itself "*ceases to exist*," and with it the right of occupancy. Thus, in such a case, *the holding does not exist divested of the occupancy right*, as was held in the Full Bench decisions already discussed.⁵ If that is so, an *under-raiyat* who is already in occupation of the holding will, as when the purchase is made by a sole landlord, come into direct relationship with the co-sharer landlord. He will gain in status and from an under-raiyat that he was he will now become a non-occupancy raiyat. This will be the case only where the occupancy right is *transferable* to which alone S 22 B. T. Act applies. In the case of a non-transferable occupancy holding being purchased by him, the position of the under-raiyat already existing on the land remains unchanged. For the position of a co-sharer landlord purchasing a non-transferable occupancy holding is, in all other respects, the same as that of a third party, and, as he by his purchase gets nothing more than what raiyat the himself could sell, the *under-raiyati* lease is valid and binding on him.

¹ The contrary view taken by Woodroffe J. in *Yeakub v. Meajan*—43 Cal. 164 (which is a case under the amended section) following *Akhil v. Hasan*—19 C.W.N., 246=18 C.L.J., 262 (which was a case under the old section) is not based on a consideration of the wording of the amended section and of the reason for which the original section was amended. Amir Ali and Finucane have expressed the same view under the amended section—see their B. T. Act, 2nd Ed. 145.

² Notes on clauses of B.T. (amendment) Bill, 1906 quoted in Ram-pini's B.T. Act, 4th Ed. 108.

³ Vide *Illustration* added to old S 22 by Act 1 of 1907. B.C.

⁴ Finucane—Amir Ali's B.T. Act, 2nd Ed. 145

⁵ *Jawadal Hug v. Ram*—24 Cal 143=1 C. W. N. 166. Finucane and Amir Ali's B. T. Act, 2nd Ed., 147.

The provisions regarding the reservation of rights of *third persons* (which include under-raiyats) in case of such transfer which occurred in the old S22(1) & (2) have been omitted from cl. (2) in the amended Acts in force in both Bengals. The effect of the omission might at first sight seem to be that co-sharer landlord purchasing the occupancy right becomes entitled to avoid the rights of third parties, including mortgages and *under-raiyati* leases created by the late tenant. The retention, at the same time, of a similar provision in the case of purchases by a *sole* landlord (in cl. (1) the amended Acts) lends some support to that view. But from what is just stated it will appear that there is no necessity for retaining such a provision, which was quite superfluous and its omission does not indicate a contrary intention.

With regard to the *mortgagee* of the holding from the raiyat, his rights would remain unaffected and he would still be at liberty to enforce his mortgage lien. And this would be so whether the landlord who acquired it was a sole or a co-sharer landlord and whether the holding was a transferable or a non-transferable one.¹

S 22 speaks of the union of the right of the *permanent* tenure-holder and the occupancy right. It does not refer to the interest of a person who holds land under a lease for a term of years. When, therefore, the *temporary* lessee of a village purchases an occupancy holding within the village during the pendency of his lease, there is no merger by operation of law. The occupancy right is not extinguished, but enures to his benefit even on the expiry of his lease.²

If a *co-sharer* tenure-holder purchased an occupancy holding under the tenure, he acquired the rights of a raiyat, though not those of an occupancy raiyat. And he can eject a tenant of the holding who is an under-raiyat under S 49 (b) B. T. Act.³

Acquisition by Ijaradar or farmer of rent.

A mere *ijaradar* or farmer of rent, by whatever name he may be called, cannot, during the period of his lease,

¹ *Ram v Bhela*—14 C. W. N. 814.

² *Ram v Manners*—4 C. L. J. 209.

³ *Nabin v Banga*—15 Ind. Cas. 705.

Or *ijaradar*, acquire a right of occupancy in any land comprised in his *ijara* or farm.¹ It was pointed out in an early case that this only prevented the acquisition by an *ijaradar* or farmer of rent of the occupancy right *by the statutory method* under the Act itself, but that he could acquire such right *by purchase*.² But, as pointed out in a later case,³ this did not accurately represent the true view of the law, and, as a matter of fact, the Legislature intervened and by Act I of 1907 B.C. the words "*by purchase or otherwise*" have been inserted after the word "*acquire*."⁴ Under the law, therefore, as it now stands, the language of S 22(3) prevents the *ijaradar* (or farmer) from acquiring a right of occupancy in any land within the *ijara* or farm *by any means whatsoever*, for instance, by purchase or otherwise.⁵ This will prevent the acquisition of a right of occupancy by an *ijaradar* (or farmer) during the period of his lease through a *purchase* behind the back of the landlord.⁴ The result is that if an *ijaradar* (or farmer) acquires by purchase (or otherwise) an occupancy holding, the occupancy right comes to an end, but the holding itself does not cease to exist,⁵ and he acquires the holding as a *non-occupancy holding* and becomes himself a *non-occupancy raiyat*; and if he settles the same with another he must be taken to have settled it in his character as purchaser and not in his character as *ijaradar* (or farmer); and, as his character as *purchaser* confers upon him the status of a *raiya*t, the person settled with cannot claim any status higher than that of an *under-raiyat*. He is, therefore, liable to be ejected after his tenancy has been terminated by a notice to quit under S 49 B. T. Act.⁶ The position is the same even when the *ijaradar* purchases *in execution of a rent decree*.² The purchaser of the holding from the *ijaradar* (or farmer) also becomes a *raiya*t.² If at the date of the grant of a permanent interest there was no occupancy right which had matured an occupancy right cannot be acquired after the date of the grant.⁷

Becomes non-
occupancy
raiya

¹ Act VIII of 1885, S 22 (3).

² *Ram v Manners*—4 C. L. J. 209.

³ *Raghubar v Manners*—13 C. L. J. 568; *Abdul v Ali*—15 C. L. J. = 16 C. W. N. 777.

⁴ Report of the Select Committee on the Bill to amend B. T. Act, 1906.

⁵ *Mehdi v Grant*—13 Ind. Cas. 636=16 C. W. N. xxii=15 C. L. J. 54n.

⁶ *Sheonandan v Ramhit*—15 C. L. J. 647.

⁷ *Akhil v Tripura*—29 Ind. Cas. 363.

The provisions of sub-section (3), while they say that When an *Ijaradar* shall in this way lose his occupancy rights, ^{co-sharer.} do not say that a person *jointly interested* in land as *Ijaradar* shall thereby lose them. It is to be observed that sub-sections (1) and (2) of the same section clearly lay down that a person interested as proprietor or permanent tenure-holder whether *jointly or singly*, shall lose his occupancy right in the land cultivated by him. It can scarcely be by accident then that a similar provision with regard to *Ijaradars* has been omitted from sub-section (3). There is no case in which it was held that under the old law a person *jointly interested* as an *Ijaradar* shall lose his occupancy right in land cultivated by him * * * Hence we must hold that both under the former law and the present law a person jointly interested in land as *Ijaradar* does not thereby lose his occupancy rights, and *a fortiori* his entire rights as a tenant in land held and cultivated by him as a raiyat.¹

Does not lose occupancy right.

Acquisition by raiyat of his land-lord's interest

—Its effect.

We have already seen that for the operation of the law of merger there must the union of the "*entire interests* of the landlord and the raiyat" in one and the same person. This will result whether the landlord acquires the raiyat's interest or the raiyat the landlord's.

Acquisition by raiyat of landlord's interest.

If a raiyat having a right of occupancy in his holding acquires the '*16-annas*' interest of his immediate landlord, the effect is to vest the holding in him, subject to the limitation that his *occupancy right ceases to exist*. For in that case "*the entire interest of the landlord and the raiyat in the holding becomes united in the same person.*"

Of 16-annas landlord.

Thus in a very recent case it has been held that if a cultivating raiyat obtains a *thika* lease and thereby becomes a tenure-holder, the *entire* interests of the landlord and the raiyat *becomes united* in the same person, and whatever right he may have acquired as a cultivating raiyat merges in the right that he acquires under the lease, and he *cannot have any right to hold the land as a raiyat*. That being so, after the expiry of the period of the lease he is bound to make over possession to his lessor².

¹ *Maseyk v. Bhagbati*—18 Cal. 121.

² *Manuers v. Satroghan*—20 C. W. N. 800=36 Ind. Cas. 178 (Pat.).

Position of
under-raiyat.

In such a case the *holding does not cease to exist but merely the occupancy right*, which is one of the incidents of the holding, disappears. The effect is to keep the *holding in suspense*. In this view the *under-raiyat*, who was already on the holding, continues to be an under-raiyat.¹

Of co-sharer.
landlord.

But, a raiyat having a right of occupancy in land does not *lose* it by subsequently becoming *jointly* interested in it as proprietor or permanent tenure-holder,² or, in other words if an occupancy raiyat acquires only a *fractional share of the landlord's* or intermediate holder's interest (*i.e.* the interest of a cosharer landlord or tenure-holder) he would not lose his right of occupancy. A distinction is thus made between the case of a cosharer landlord acquiring the raiyat's interest and a raiyat acquiring a fractional share of the landlord's or tenure-holder's interest.

Of Zuripeshgi
lessee.

A raiyat by taking a *Zuripeshgi* lease of land of which he was previously in possession as a raiyat does not lose the *raiyyati* status or, divest himself of the right to acquire a right of occupancy in the land³.

Where a *mokarari* tenure is created in favour of a raiyat, who went on cultivating *the land for 12 years*, he acquired an occupancy right and *retained* it, even although the *mokarari* right he obtained is extinguished⁴.

Of Mokarari
tenure.

Where a tenant who had lawfully entered into occupation of a holding as a raiyat under authority from the landlord's *Ijaradar* for a term, his *raiyyati* interest would continue even after the expiry of the *Ijara*⁵.

Of *Ijara* or
farm.

A raiyat would not *lose* the right of occupancy that he has in the holding "by subsequently holding the land in *ijara* or farm, nor would he do so by taking an *ijara* or farm of the estate in which his holding is situate."⁶ But, as pointed out in a very recent case:—"The question really is what has been the *conduct of the (party)*. Has he *kept alive and distinct the two interests*—which he possessed?" And if from the circumstances of the case it appears that he has not kept distinct the occupancy right from his right as a tenure-holder, there will be merger of the occupancy right in the superior right of the tenure-holder that he has

¹ *Akhil v. Hussain*—18 C. L. J. 262=19 C. W. N. 249=20 Inp Cas. 698.

² Act VIII of 1885, S 22, *Explanation*.

³ *Lal v. Mackenzie*—19 C. W. N. 229.

⁴ *Bama v. Ram*—19 C. W. N. 853 following *Nilmadhab v. Bibu*—13 W. R. 410: *Emani v. Akbar*—22 W. R. 133.

⁵ *Atal v. Lakhi*—10 C. L. J. 55.

⁶ *Durga v. Hari*—19 C. W. N. 578.

subsequently acquired. Thus, where a person having an ordinary *jote* (i.e., an occupancy holding) in the lands in suit, first acquired the *putni* and *kayemi* *jote* rights, then created an under-tenure on the property, and the plaintiff, having purchased the land at a sale held in execution of a money decree against him, brought a suit to recover possession thereof. The defence was that the plaintiff purchased his right as tenure-holder only and not his occupancy right. *Held*—that the defendant having created an under-tenure on the property, if his occupancy right had been kept alive he would have become tenant under the under-tenure-holder and would have been under an obligation to pay him rent. This he admittedly never did. His conduct is consistent only with the hypothesis that he *treated the occupancy right as no longer existent* and he cannot now turn round and set up the occupancy right to the detriment of the execution purchaser. No question of merger by operation of law arises here, nor whether against the will of the defendant the subordinate had merged in the superior interest.¹

Effect of submersion of holding.

Section 6 of Act VIII of 1869 makes it quite clear that a raiyat retains his right of occupancy only so long as he pays rent and that mere non-payment of rent by an occupancy raiyat did not extinguish, or constitute an abandonment of, the tenancy under that Act.² Hence, where the land had been *washed away* by the action of the river and the raiyat had ceased to assert any right thereto by payment of rent, he could not, when the lands re-appeared, claim to be regarded as a tenant still holding the rights that he previously had.³ This view is supported by the principle laid down by the Privy Council in the cases noted below,⁴ namely, that a person whose lands have been submerged may take the most effective means in his power to prevent the possibility of any question of dereliction or abandonment being raised against him, if he gets the description and measurement of the submerged land recorded and continues to pay rent for it. Thus, although mere non-payment of rent may not

¹ *Pramatha v. Kishori*—21 O. W. N. 304.

² *Whoy v. Kailash*—14 Cal. 751.

³ *Saligram v. Puluk*—6 O. L. J. 149.

⁴ *Lopes v. Muddun*—13 M. I. A. 407. *Nagendra v. Mahomed*—10 B. L. R. 406.

be conclusive evidence of abandonment, non-payment of rent taken with submergence of land is sufficient to indicate an extinguishment of the right of occupancy.¹ This was under the old law. The question as to the effect of the present Act in a case of diluvion or submersion of the occupancy holding and non-payment of rent for many years has not yet been decided. But it may be pointed out that the B. T. Act does not lay down that the payment of rent by the raiyat necessary in order that he may retain the right of occupancy. And provided that the raiyat exercises such possession of the holding as it is capable of, during submergence, which precludes any inference of his abandoning it, there is no reason why he should lose the right of occupancy on account thereof. As pointed out by Mookerjee J. in a case just published: "If the land was wholly or partially subject to inundation by the water of a river the plaintiff must be deemed to have been in possession of the submerged portion during the period that such tract was covered by water."²

¹ *Hari v. Ashgar*—4 Cal. 894.

² *Khedan v. Rajendra*—29 C. L. J. 259.

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Addenda.

Bringing case law down to September 1919.

Add page 110, para. 1 last but one line after "5" :—

"A tenure-holder may settle a raiyat on the land of his tenancy, and a raiyat also may, in his turn, sublet the land of his holding to an under-raiyat. Consequently, the mere fact that a *tenant has sublet* his land does not, by itself, establish conclusively that his status is that of a tenure-holder and not that of a raiyat. Further, a *tenure-holder*, though a middleman who collects rent, may *yet cultivate a portion* of the land himself, just as a *raiyat*, though he himself a cultivator, may *settle a portion* of the land with under-raiyats. The test to be applied in such a case to determine the status of a tenant is furnished by S 5(4) B. T. Act, namely the *purpose for which* the right of *tenancy* was *originally acquired*. In cases when the *origin* of the tenancy is *unknown* the *mode of user* may furnish a valuable clue to determine the original purpose of the tenancy, and where the *terms* of the grant are *ambiguous*, evidence of *conduct subsequent* the parties may also be admissible."

—*Secretary v Digambar*—27 C. L. J. 334.

Add page 111, para. 3, line 6 after "4."

"There is no room however, for its application where the *terms of the original grant are known*."

—*Secretary v Digambar*—27 C. L. J. 334.

Add page 111, para. 3, line 18 after "4."

"In determining the status, therefore, of a tenant, *viz.*, whether he is a tenure-holder or a raiyat, two elements have to be borne in mind, *firstly*, the *purpose* for which the land was acquired, and *secondly*, the *extent* of the tenure or holding. A close examination of the definition clauses makes it quite obvious that both these elements are closely inter-related. The law assumes the raiyat to be the actual cultivator of the soil, either by his own labour, or the labour of the members of his family, or by his hired labourers, and it assumes also that ordinarily a larger area than 100 Bighas would make cultivation by personal agency impossible. The presumptions provided in S 5(5) is founded on that hypothesis."

—*Devendra v. Bibhudhendra*—27 C. L. J. 548, P. C.

Add page 112, after para 2.

“ But before a person can become a *settled raiyat* of a village he must be a *raiya*. Mere *occupation of homestead* in a village for more than 12 years would not make the occupier a *settled raiyat* of the village.”

—*Kamal v Ganesk*—47 Ind cas 829.

Add page 113, para 3, before “ A raiyat.”

Upon the question whether a *raiya* holding at fixed rates after he has held the land for 12 years in a village can become a *settled raiyat* of the village and acquire a right of occupancy there is divergence of judicial opinion.”

—*Lakhi v Hamid*—27, C. L. J. 284 (286).

Add page 116, after footnote 1.

1a. *Akhil v Hasan*—18 C. L. J. 262=19 C. W. N. 246, referred to in *Gopal v Japai*—28 C. L. J. 84=22 C. W. N. 618.

Add page 118, after para. 1.

“ An occupancy right may be acquired by a joint family, and a landlord in contracting with an individual may be dealing with a whole family represented by that individual. An occupancy right frequently is a part of the ancestral estate, and therefore the younger sons of a *mitakshara* joint family has interest in it, which it is beyond the power of the father to destroy or encumber for anything but a family purpose.

—*Sukru v Brahmapurai*—4 P. L. J. 354.

Add page 130, para. 2, line 10.

“ So *Ghalwali* lands were subject to the acquisition of occupancy right and the B. T. Act, S 180 did not take away such right acquired or enjoyed.”

—*Siti Kapta v Bipradas*—27 C. L. J. 556=22 C. W. N. 763.

Add page 131, line 20, after “tenure.”

Further, where, for instance, land is held under a *Jagirdar* who held his *Jagir* as a *Kotali Jagir*, the *Zemindar* is entitled to have the land that is given to the *Kotwal* for the purpose of performing his duty, returned to him in the same condition as is given to the *Kotwal*, apart from the rights of any other person. A right of occupancy cannot, therefore, be acquired in a land held under a service tenure.

—*Jafaruddin v Jamni*—28 C. L. J. 249=23 C. W. N. 136, See *Suren Sen's B. T. Act*, 3rd Ed. 70.

Add page 135, para 1, line 4.

"Where certain *ch r* lands formed a part of the holding for which the raiyat had paid rent continuously for 12 years but during the period they had occasionally submerged. *Held* that the mere fact of submersion did not destroy the right of the tenant to acquire occupancy right therein. Parts of lands comprising the holding may have submerged for long or short period but they did not for that reason cease to be held by the tenant and to form part of his entire holding.

—*Kesho v Jirdhan*—2 P.L.J. 4.

Add page 148, para. 2, after 5.

"In dealing with the presumption the real question at issue is *whether the rent has been changed or not, and not whether one uniform rate has been paid or not.* There may be cases in which a raiyat might not have paid his rent for many years prior to the institution of the suit for enhancement; but if there has been no change in the rent payable by him, he is not deprived of the presumption which the law has expressly laid down for his benefit. The payment at a uniform rate is one mode of shewing that the tenure was held at a uniform rate; but what is only a particular mode of proceeding to the solution of, a question ought not to be confounded with the question itself."

—*Kshirod v Gour*—27 C. L. J. 281, following *Ahmed v Gulam*—11 W. R. 432.

Add page 148, para. 2, line 2, from bottom.

"The rule and presumption may thus be applicable to several parcels of lands of which the holding consists when the question arises. Part of the holding may be *inherited* land, part may have been *acquired* by purchase from another raiyat. In either case, the raiyat may *lack on his own occupation* of the land at an unvaried rent to the *occupation* at an unvaried rent of his predecessors in interest who, as regards lands acquired by purchase from another raiyat, will include his vendor and his vendor's predecessors. So subdivision or amalgamation does not destroy the presumption.

—*Abhoy v Rajani*—22 C. W. N. 904=29 C. L. J. 371.

Add page 157, end of para. 2.

"Where the raiyat came into occupation of the land agreeing to pay rent at the rate of Rs. 22-14 As after deduction of the remissions mentioned, and subsequently executed a *Kaibuliat* by which he bound himself to pay the said *Jama*, in the schedule

to which is mentioned the remission (*Hajat*) of Rs. 4 as a mark of favour; to him on account of his services as *Pradhan* and the question was whether it was a permanent remission annexed to the grant or a temporary and personal remission contingent on the performance of services as a *Pradhan*. It appeared that ever since the death of the original tenant rent was realised at the rate of Rs. 22-14 As for a period of a quarter of a century. *Held*—that under such circumstances the landlord is not entitled to rent at the higher rate.

—*Umesh v Surendra*—29 C. L. J. 8.

Add page 159 after para. 1.

“ But where on a fresh survey made by the landlord the area of the raiyat's holding was increased, and the raiyat agreed to pay an enhanced rent, which is considerably in excess of the authorised increase of two annas in a rupee, for the holding as found by measurement, *Held*—that as the landlord cannot point to any particular piece of land for which the raiyat agreed to pay him so much rent, the rate must be considered as applied to the whole area and for the purpose of considering S. 29 we must take the average rate per Bigha, throughout the whole area.”

—*Sonaulla v. Bhagabati*—28 C.L.J. 142.

Add page 181, line 6.

“ The fact that a certain item is dealt with in the *Kabuliat* in a separate clause and is stipulated to be paid separately from the rent and also the fact that it is not included in the instalments of rent have important bearing upon the question whether parties intended to treat it as part of the rent or as something different from rent.”

—*Bijoy v. Krishna*—21 C.W.N. 939.

Add page 185, para. 1 after “payment.”

“ *Bhaoli* rents are not ascertained rents, and therefore interest cannot be claimable thereon under S. 67 B.T. Act. And though as soon as the Court adjudicates upon the claim the amount becomes an ascertained amount, interest cannot even then be claimed under the said Section as it applies only to rents which are payable quarterly and cannot apply to *Bhaoli* rents which are payable at two periods constituting two instalments. The Interest Act however, entitles the landlord to interest on the *Bhaoli* rent provided the raiyat withholds the payment without any reasonable and probable cause.”

—*Bisheshwar v. Husain*—4 P.L.J. 282.

Add page 182, after para. 2.

"The rent due to the landlord is also suspended where he, having let out a portion of the land to an earlier lessee, lets it out again with other lands to a subsequent lessee and is in consequence unable to put the latter in possession of such portion as when he has ousted him from a portion of the holding".

—*Manindra v. Narendra*—23 C.W.N. 585.

Add page 187, line 1 from bottom after "himself."

It could not be ignored by the landlord. The sale does not *ipso facto* cancel incumbrances and a notice must be given under S. 167 B.T. Act, (See *Beni v. Rewat*—24 Cal 746 *Kalikanand v. Bipradas*—21 C.L.J. 265 = 19 C.W.N. 18) the procedure provided by that Section being the only mode of annulling an incumbrance (*Sashi v. Gagan*—22 Cal 364.) It follows that the sale by the landlord in execution of his rent decree is subject to the mortgage, but with the right in the purchaser (even though he be the landlord) to annul the mortgage within one year. And where the landlord as purchaser has not done this, the person who takes the land in settlement from him, takes it subject to the mortgage which is still subsisting.

—*Pran v. Atul*—22 C.W.N. 662 per Greaves J.

Add page 187, para 1, line after "incumbrance."

"The purchaser under the mortgage decree cannot oust the purchaser in possession under a prior rent decree, even though there has been no notice under S167. He may be regarded as a *second mortgagee* and as such has the right to redeem the mortgage by payment of the amount due under the rent decree.

—*Sur t v. Murtidhar*—4 P.L.J. 362, See also *Chiodette v. Quadress*—1 P.L.J. 161.

Add page 187, after para 1, new para.

"An incumbrance implies a limitation of the rights of the tenant and not a total extinction of them. The sale of a portion of a nontransferable occupancy holding cannot therefore create an incumbrance in it and the landlord purchaser at a sale in execution of his rent decree is not required to annul the interest of a purchaser of a portion of a nontransferable occupancy holding.

—*Fazarali v. Poroo*—28 C.L.J. 266 (following *Tomizuddin v. Khoda*—11 C.L.J. 16, *Abdul v. Ahmadar*—22 C.L.J. 356, distinguishing *Chandra v. Kalli*—23 Cal 254, *Jogeshwar v. Abed*—3 C.W.N. 13). Also *Bijoy v. Surendra*—29 C.L.J. 4.

Add page 188, after line 1.

"So where a landlord, after obtaining a decree for arrears of rent against a tenant in respect of a nontransferable occupancy holding, recognised the purchaser of the holding, who had bought it long before the institution of the suit for rent, as his tenant without any liability being taken by the purchaser for the decretal debt, and subsequently put the decree which he had obtained against the old tenant into execution and sold the holding. *Held*—that the old tenancy had come to an end, and the holding had passed to the purchaser. Therefore the landlord could not put it up to sale as the holding of the old tenant."

—*Girish v. Naendra*—23 C.W.N. 654.

Add page 191, after para 2, new para.

"If the landlord desires to obtain a decree good against the land, under the B.T. Act, he must ordinarily (apart from any question of representation) implead all the cotenants, including the heirs or legal representatives of a deceased cotenant. But for purposes of a money decree (in the absence of express agreement to the contrary) he is free, under S. 43 of the Contract Act, to sue any or all of the tenants."

—*Krishna v. Kali*—22 C.W.N. 289 where all previous cases cited and discussed.

Add page 192, para 4.

"An application to have the rent commuted should be entertained and determined on the merits by the officer to whom it was presented by the applicant. Consequently the S. D. O. cannot transfer an application received by him to a settlement officer."

—*Jadu v. Pran*—27 C.L.J. 569=22 C.W.N.

Add page 193, after para 3 new para.

Jurisdiction of Civil Court.

The Civil Court it is well-settled is not competent to examine the propriety of an order of commutation made within jurisdiction under S 40 B.T. Act; in other words, it cannot determine whether in the circumstances of the particular case, commutation was or was not properly directed; or whether the amount assessed as cash rent is or is not adequate. But if a question arises it is incumbent upon the Civil Court to satisfy itself that the order is made with jurisdiction; for an order made without jurisdiction is a nullity, and does not affect the rights and obligations of the parties. Where, therefore, the rent was commuted by an officer not competent to do so, the land-

lord was held entitled to recover the price of the produce which the tenant was, before the commutation, liable to deliver."

—*Jadu v. Pran*—27 C.L.J. 569.

Add page 194 footnote 4.

"See *Asutosh v. Haran*—30 C.L.J. 41 where all the previous cases on the subject are considered."

Add page 195 footnote :—"See *Pokhan v. Rajani*—23 C.W.N. 614."

Add page 199 para 1, line 8, after "all".

"A claim for compensation may be either in addition or as alternative to a demand on the tenant to remedy the misuse or the breach."

—*Bahadur v. Makhan*—29 C.L.J. 430.

Add page 199 footnote 2 "followed in *Bahadur v. Makhan*—29 C.L.J. 430.

Add page 199, line 8 after "all 2."

Add page 199 footnote 4 :—"=29 C.L.J. 40."

"The object of giving the notice is to give the tenant an opportunity of remedying the breach so that on remedying it and on payment of compensation he may avoid ejectment. A notice requiring him to quit the land even if he remedied the breach is not a valid notice."

—*Kali v. Kali*—23 C.W.N. 569.

Add page 205, line 13, before "where" and above "parties" "3a".

Add page 205 after footnote 3.

3a *Kkabbar v. Hora*—13 C.L.J. 1=15 C.W.N. 335 :
Khater v. Sadruddee—34 Cal. 922.

Add page 205 to footnote 4 "*Pyari v. Hem*—16 C.W.N. 730.

Add page 205 footnote 5 "*Jeyapore v. Rukmini*—29 C.L.J. 528 P.C."

Add page 206 footnote 1 "*Jeyapore v. Rukmini*—29 C.L.J. 528 P.C."

Add page 207, para 1 after "cultivating it" in line 11.

"At the time when the Revenue Sale Law was passed, the law relating to landlord and tenant in force was Act X of 1859, and under that Act there were two classes of occupancy raiyats, viz., occupancy raiyats at fixed rent, and occupancy raiyats who did not hold at fixed rates of rent. Both these classes of occu-

pancy raiyats are protected under the provisions of the Revenue Sale Law.

—*Lakhi v Hamid*—27 C.L.J. 384.

Add page 207, para 1, line 19 after "fixed rates."

"Occupancy raiyats at fixed rates of rent" do not find any place in the classification of raiyats under the B.T. Act. But if a raiyat had a right of occupancy at a fixed rent under Act X of 1859 we do not think that he lost his right of occupancy and the privileges attaching to it after the passing of the B.T. Act, merely because occupancy raiyats holding at fixed rates of rent are not separately mentioned in the classification of raiyats under the B.T. Act.

—*Lakhi v Hamid*—27 C.L.J. 284=

Add page 208, para 1 after "occupancy" in line 1.

Mookerji J. in referring to the omission of 'a raiyat holding at fixed rates' from the protection suggests the explanation that 'the policy of the Legislature was to protect the raiyat, but not necessarily to the complete detriment of the purchaser of a tenure at a sale for arrears of rent. If a *raiya* holding at a fixed rate of rent were protected from ejectment, the purchaser would acquire the property in an encumbered condition; for, he would be unable, not only to eject the raiyat but also to enhance the rent. On the other hand, if occupancy raiyats and non-occupancy raiyats alone were protected from ejectment, while their possession would be maintained, they would be liable to have their rent enhanced from time to time, at the instance and for the benefit of the purchaser of the tenure."

—*Lakhi v. Hamid* 27 C. L. J. 284 (287)

Add page 213, para 2 after 7.

"The mere fact that the tenant has a house in an adjacent *monja*, does not deprive him of his right to erect upon his occupancy holding another house for the purpose of making a residence for himself and his family."

—*Mahadeo v. Sheogulum*—2 P.L.J. 634.

Add page 223, footnote 1.

"*Chandi v. Shamla*—28 C.L.J. 91=22 C.W.N. 179 *Per* Beachcroft J. where all cases on the point were again reviewed and the conclusion of Coxe J. accepted"

Add page 223, footnote 6 after "21 C.W.N. c.l.v. iii"

"=29 C.L.J. 388=23 C.W.N. 435: *Alimuddi v. Chintaharan*—29 C.L.J. 388=23 C.W.N. 436.

Add page 224 footnote 5 after "21 C.W.N. cl. viii."

"=29 C.L.J. 388=23 C.W.N. 435."

Add page 224 line 1 after 'circumstances'.

"As pointed out in a very recent case:—"It seems to us that although the lease may not be given in evidence there is no valid reason why the tenancy cannot be proved *alimude* by possession and payment of rent to the rayat."

—*Nibaran v. Ram*—29 C.L.J. 479 : *Gonesh v. Thanda*—24 C.L.J. 539. But see *Jarip v. Durfu*—16 C.L.J. 144=17 C.W.N. 39,

Add page 224, para. 1, line 8 after. "2"

"Although the under-raiyats' lease may be absolutely void and therefore passed no title to him, by reason of the fact that it was granted in excess of what a raiyat was entitled to grant to an under-raiyat under the provisions of the B.T. Act, yet if the sublessee had been in possession of the property on the basis of the *kabuliat* when he was dispossessed, he had sufficient interest in the property and can prove his title by his possession and is thus entitled to recover the land, if he is dispossessed, on a declaration of his title thereto."

—*Gour v. Baloram*—22 C.W.N. 61.

It is worthy of note that it was not a case in which the under-raiyat in possession, being dispossessed, brought a suit for recovery of possession, within 6 months of his dispossession under S. 9 of the specific Relief Act in which no question of title can be gone into.

Add page 225, footnote 3.

"See *Lani v. Mahammad*—20 C.W.N., 948 : *Aminuddi v. Ananda*—28 C.L.J. 507."

Add Page 228, end of para 2 after "Purpose".

"But this is only where the sub-lease is not granted in contravention of S. 85. Otherwise, notices under S 167 or S 49 are not necessary.

—*Bhuban v. Badan*—30 C.L.J. 201.

Add page 230, para 3, line 6 after 6.

"An express consent in writing within the meaning of S 88, B.T. Act does not mean a consent which is to be *implied from certain documents*. Therefore, the consent, if any, which arises *by implication* from the *rent receipts* granted by the landlord in respect of a part of a tenure or holding, with a *knowledge* that the tenancy has been sub-divided by the tenants, or, from

jamawasil baki, or, from *road cess* returns filed by the cosharer of the landlord, cannot be a consent in writing within the meaning of S 88, B.T. Act. Such documents cannot be taken as *principal evidence to prove a consent* in writing which does not in fact exist; they can only be used as evidence of such consent *firstly* when it is proved that there had been in fact a *consent in writing*, *secondly* when such consent in writing, although sought for could not be produced and *thirdly* therefore, it must be *presumed*, at any rate, against the person who made it, that there had been a *consent* and that that consent had been *in writing* as stated by some witnesses who were believed to have proved it—*Rajani v. Hara*—41 Ind. Cas. 501=22 C.W.N. 693.

Add page 231 before para 2.

"But it is not always easy for the tenant to produce an *express* consent. It may be *verbal* or acted on by both parties or may be lost. But"

—*Rajani v. Hara*—41 Ind. Cas. 501=22 C.W.N. 693.

Add page 231, para 2 after "*distribution*"

"The rent roll mentioned therein is a *jamabandi*—a permanent document kept in the estate or *sherista* of a landlord, which contains a list of the tenants and the rents payable by them which is kept up and amended from time to time. A *jama wasil baki* (an annual statement of the rents payable and received from a particular estate) is not a rent roll within the meaning of the proviso."

—*Rajan v. Hara*—41 Ind. Cas. 501=22 C.W.N. 693.

Add page 239 footnote 6.

"See also *Goher v. Alifuddin*—30 C.L.J. 13."

Add page 249 para 2, lines 13 after "*transferee*".

"Even if there is a customary rate of *nazar* which the landlord is obliged to accept the transferee can have no title under the custom until he pays or tenders the *nazar* at that rate."

—*Mina v. Ichamoyee*—28 C.L.J. 258=22 C.W.N. 929.

Add page 249, para 2 line 17 after "*nazar*"

In order to establish a custom of transferability subject to the payment of a customary *nazar* the evidence must shew that the landlord is bound to recognise the transfer when *nazar* of the amount, or the rate, determined by custom, is tendered to him. There is all the difference between a *fixed nazar* which the landlord is obliged to accept, whether he likes it or not, and a *nazar* which is bargained for and paid as the price of the consent which he may give or withhold as he pleases. A practice or course

of business in a zemindary office according to which transferee is recognised provided that the amount of the *nazar* is satisfactory to the landlord is not sufficient."

—*Mina v. Ichamoyee*—27 C.L.J. 587=22 C.W.N. 929.

Add page 250, para 1, line 4 after "it"

"The payment of *nazar* without more is an indication that the *jotes* are not transferable without the landlord's consent, given on receipt of the *nazar*."

—*Mina v. Ichamoyee*—28 C.L.J. 587=22 C.W.N. 929.

Add page 250, para 1, line 18 after "unsuccessful".

"A custom which leaves the amount or rate of *nazar* indefinite must be void for uncertainty." The position is no whit better than when the *nazar* is determined by agreement. No one knows what he has to pay and the landlord can demand what he pleases and refuse his consent unless he is satisfied."

—*Mina v. Ichamoyee*—28 C.L.J. 258=22 C.W.N. 929.

Add page 262, footnote 3:—"Goher v. Ahfuddin—30 C.L.J. 13.

*Add page 264, para 2, end*¹.

Where the occupancy raiyat having no transferable right sold the entire land of the tenancy to a stranger, and it is found that notwithstanding the sale he is in occupation of the homestead portion, which covers about one-tenth of the entire area, but has made no payment of rent to the landlord, there is ample indication of his intention to sever all connexion with the land as tenant under the landlord; and in these circumstances the landlord is clearly entitled to take up the position that there has been an abandonment.

—*Ishan v. Nishi*—22 C.W.N. 853 following *Sailabala v. Sriram*—7 C.L.J. 303=11 C.W.N. 873: *Aminnessa v. Jinat*—19 C.W.N. 43=42 Cal. 751.

Add page 264, footnote 6:—"Ishan v. Nishi—29 C.L.J. 1.

*Add page 274, para 1, last line, after "transaction"*⁵.

"The purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right, but if he obtains recognition from the landlord, whether by payment or otherwise, then in the absence of special circumstances, he is admitted to the origin of tenancy with all its incidents and becomes the successor in interest of the vendor."

—*Abhoy v. Rajani*—29 C.L.J. 371=22 C.W.N. 904.

Add page 267, para 1, line 9, after 'holding'.

“ [Whether by sale or otherwise].

—After ‘ not ’.

“ [i.e. otherwise than].

—After “ sale ”.

[“ Of the whole holding ”].

—Footnote 1.

“ Followed in *Asarfi v. Ramkhelawan*—4 P.L.J. 115 F.B.

Add page 278, after para 1.

“ Thus all transferees of a *portion* of such holdings have the right to possession even against the landlord until abandonment, relinquishment or repudiation takes place, and the common law imposes a corresponding obligation on the landlord to refrain from extinguishing such rights by committing a tortious wrong in conspiracy with a third person; and if this obligation is not observed and damage to the transferee results, the common law may be invoked to vindicate those rights. Merely because such interests may be extinguishable under certain circumstances provided by the statute it nowise follows that it may meanwhile with impunity be illegally or unlawfully infringed to the detriment of the transferee.”

—*Asarfi v. Ramkhelawan*—4 P.L.J. 115 F.B.

Add page 353 footnote 3,

“ Following *Hem v. Ashgar*—4 Cal. 894 :”

Add page 354, line 1 after “ occupancy ”.

“ But in a recent case the Judicial Committee observed :—
“ Their Lordships do not find themselves in accord with the rule of law expressed in that case (*Hem v. Ashgar*—4 Cal. 894). They think the principle applicable to this class of cases is correctly enunciated in *Mazhar v. Ravgat*—18 All. 290 in which it was held that where the tenants, though they ceased to pay rent during the period of submersion, made no overt indication of their intention to relinquish the said lands, but, on the contrary, on the river shifting its course, laid claim to lands which had emerged and which they alleged to be identical with their former holding there was no relinquishment.”

—*Arun v. Kamini*—41 Cal. 688 = 19 C.L.J. 272 refd. to in *Aminuddi v. Tarini*—29 C.L.J. 564.

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